In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 28, 1970—Murphy's petition for writ of habeas corpus filed in U. S. District Court for the District of Oregon.

Mar. 11, 1971—Pre-trial stipulation and order entered, superseding pleadings.

June 2, 1971—Opinion and judgment of District Court entered, dismissing petition.

June 11, 1971—Murphy's notice of appeal filed.

May 30, 1972—Opinion and judgment of U. S. Court of Appeals for the Ninth Circuit entered, reversing District Court.

June 12, 1972—Cupp's petition for rehearing filed.

July 6, 1972—Petition for rehearing denied.

Aug. 7, 1972—Cupp's petition for writ of certiorari filed.

Dec. 4, 1972—Certiorari granted.

PRE-TRIAL STIPULATION AND ORDER

[Names of counsel omitted in printing]

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DANIEL P. MURPHY, Petitioner, vs. HOYT C. CUPP, Superintendent Oregon State Penitentiary, Respondent.	)))))	Civil No. 70-883 Pre-Trial Stipulation and Order

JURISDICTION

The parties agree that the United States District Court for the District of Oregon has jurisdiction over the above captioned case by virtue of 28 USC section 2241 to 2254 and the Constitution of the United States.

AGREED FACTS

1. Petitioner is in custody of respondent pursuant to a 15-year sentence of the Circuit Court for Multnomah County on a conviction of murder in the second degree after trial by jury. This conviction was affirmed by the Court of Appeals of the State of Oregon on the merits. Timely petition for review was denied by the Oregon Supreme Court and the Supreme Court of the United States denied a timely petition for certiorari.

2. Petitioner's contention in this proceeding was raised in each of the above courts and petitioner has exhausted his state remedies.

PETITIONER'S CONTENTIONS

1. Petitioner's fingernails were unlawfully scraped and the scrapings seized by police, without a warrant, without his consent, not incident to an arrest, without probable cause to arrest or search, in the hope of finding evidence not known to exist, which scrapings were later determined to be evidence of guilt and used by the State at his trial to obtain his conviction.

2. This conviction so obtained violated the due process clause, section 1, Fourteenth Amendment, United States Constitution.

RESPONDENT'S CONTENTION

1. Denies that the scraping, seizure and use of the evidence so obtained at petitioner's trial violated petitioner's constitutional right to due process of law.

ISSUE OF LAW

1. Whether the action of the police in obtaining this evidence in this manner and its use at the trial to obtain petitioner's conviction violated petitioner's constitutional right to due process of law under section 1, Fourteenth Amendment, United States Constitution.

EXHIBITS

The following exhibits may be received without further authentication:

Petitioner's 1. Transcript in Circuit Court
2. Petition for Certiorari

Respondent's 11. [sic]
12. [sic]

The foregoing constitutes the pre-trial order in the above cause, the pleadings pass out of the case and are superseded by this order, which shall not be amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Dated this 11th day of March, 1971.

/s/ Gus J. Solomon
United States District Judge

STIPULATED AND APPROVED.

/s/ Howard R. Lonergan
Attorney for Petitioner

/s/ Jim G. Russell
of Attorneys for Respondent

/s/ Daniel P. Murphy
Petitioner

Presented by:

/s/ Howard R. Lonergan

EXHIBIT NO. 1—TRANSCRIPT OF MURPHY'S STATE COURT TRIAL (excerpts)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,)
)
Plaintiff,)
)
vs.) No. C-49322
)
DANIEL PAUL MURPHY,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

[**(a) Hearing on Motion To Suppress Evidence**]

[December 11, 1967]

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(Whereupon the following proceedings were had in camera:)

THE COURT: Gentlemen, at this time the Court is going to entertain argument on defendant's motion to suppress, which was filed last Friday.

I want the record to show that the Court has decided to hear this motion in what I refer to as open chambers, rather than open court, because of the nature of the motion. The motion is directed at what I feel is damaging evidence, as indicated by the memoranda filed by respective counsel. And, should the motion be allowed,

I do not want to take the chance, so to speak, of somebody drifting in the courtroom. I have no idea how long the motion will take, whether it will call for testimony in addition to the memoranda, and, for that reason, I don't—I want to protect against any possibility of somebody walking in the courtroom. There may be a stray juror, not in the case, which we can't screen, so to speak, don't have the time to do it, or somebody else who, in turn, might pass on what happened in the courtroom. So, for that reason, I feel that the matter should be disposed of here. If there's any objection by counsel, I'll entertain it at this time. Mr. MacLaren?

MR. MacLAREN: The defense has no

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objection, Your Honor.

THE COURT: Mr. District Attorney?

MR. O'DELL: None at all.

THE COURT: All right. Now, I have read, as I heretofore said, memoranda of both counsel here. And it seems to me that the facts are pretty well agreed to between the attorneys, and this is going to resolve itself into a question of law.

I think probably that Mr. MacLaren's position here that, if there's a search under circumstances such as this, without a warrant, raises a prima facie question of its unconstitutionality, therefore, the State should proceed and satisfy the Court that their motion should not be allowed. I'm not indicating that's a burden of proof, but I think, at least, it's a procedural method to proceed

with, who has the burden of going forward under the circumstances.

Now, you indicated, Mr. District Attorney,—Mr. O'Dell, in view of the fact there's two of you here, for the record—that probably you and Mr. MacLaren would discuss this matter before appearing here this morning, and to narrow the issues.

MR. O'DELL: I was going to, but he was tied up with a person and I wasn't able to talk with him.

THE COURT: All right. Are my remarks thus far, are they pretty well—is that true?

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MR. MacLAREN: Yes, Your Honor.

MR. O'DELL: Fairly well accurate.

THE COURT: All right.

MR. O'DELL: I assume that you've read the Statement of Facts as set forth in my memorandum.

MR. MacLAREN: Yes.

MR. O'DELL: Do you agree primarily with those, or do you take issue with those?

MR. MacLAREN: For the purpose of this argument on the motion, I think they're accurate and—

THE COURT: Do I understand—there's one thing that's been bothering me, but I think I understand from both the attorneys' memoranda, that the State had already determined that the deceased met her death by strangulation before this search was made. Is that right?

MR. MacLAREN: Yes.

MR. O'DELL: That's correct.

THE COURT: Well, go ahead.

MR. O'DELL: Yes. Well, Your Honor, I can call witnesses to establish points which may be outside of the Statements of Fact and I would do so.

THE COURT: Well, I'm just wondering what we'd need.

MR. O'DELL: But, based upon the Statement of Facts, which is before the Court, and on the

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memorandum, I would urge that this is the type of search, or investigation, if you will, if in fact it is a search, which should be allowed under all of the attending circumstances of this particular case.

THE COURT: All right.

MR. O'DELL: I would simply urge that this is a search based upon probable cause. And, while the two main categories of searches are those incident to the existence of a warrant based upon a valid affidavit, and those others incident to a lawful arrest, I state that there is a third category upon which a search can be carried out without violating the United States Constitution or that of the State of Oregon, and that is, a search based upon probable cause. I would urge that the Court's function, main problem, in this case is to determine whether or not there was probable cause for the officers to act.

Now, the Fourteenth Amendment, the test set down under the wording of the Fourteenth Amendment, is "There will be no unreasonable . . .", and reasonable-

ness is the test through which every search must stand, whether or not there is an arrest and whether or not there is a warrant, and looking at the totality of the arrest. And the knowledge of the officers at the time they confronted Mr. Murphy at the Portland Police Station, in the presence of counsel, their actions based upon the totality of the facts and their

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knowledge at that time, was no more than reasonable. And, if the Court finds that the search was reasonable based upon probable cause, we maintain that the Constitutional guarantees have been met.

Now, in this particular case, the nature of the evidence that was sought by the police officers can be readily seen by the Court to be that which is easily destroyed. The Statement of Facts indicates that he was requested to give fingernail samplings. At this point the defendant had notice of what we intended to obtain, and a warrant was not obtainable under those circumstances. This evidence is easily secreted or destroyed by a simple method of cleaning one's fingernails.

Now, there are many cases which allow more latitude and broader interpretations of the rules of search, where the evidence is highly mobile or capable of being put without the reach of police officers easily. But, in essence, the nub of the whole thing is whether or not police officers are going to be forced to arrest when probable cause exists; are they going to risk further investigation; are they going to risk this being taken from their grasp because they failed to arrest.

THE COURT: What time was this search made?

MR. O'DELL: It was made in the evening hours. And —Counsel was there. I would assume it was

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around nine o'clock or so.

THE COURT: It was after court hours, general court hours?

MR. O'DELL: Yes. Mr. Murphy did not return from his place, Metolius River, until after court hours.

THE COURT: All right.

MR. O'DELL: And it was around, to the best of my recollection, eight-thirty, nine o'clock. That's my best guess.

THE COURT: All right, go ahead.

MR. O'DELL: And the officers would have been derelict in their duty had they done any other thing based upon their knowledge at the crime scene. As the evidence will show, the throat was lacerated by, what the doctor termed, those characteristics left by fingernails. We knew Mr. Murphy was at the scene. We knew at this time we were in the possession of the fact that similar attacks had been made in the past upon Mrs. Murphy of this particular type. We were in the possession of the facts that he was there; he was seen removing himself from the scene in a suspicious manner, in that he pushed his vehicle out of the driveway prior to starting it, it was a noisy vehicle; we knew that he hadn't been there for an extended period of time, perhaps three months; and we knew that the relationship was strained

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between the parties.

We have every reason to believe, based upon our investigation at this point, that this man committed the crime of murder. Now, based upon this knowledge being in the mind of the police officers, at this time, we feel it was reasonable for him to act as he did. We're not claiming that, when a person is found dead and strangled, that a police officer can go down the street taking fingernail samplings from the public at large. But we have a prime suspect; we knew there was a crime committed, and we have probable cause to believe this man committed it. We have the right to obtain evidence based upon probable cause.

THE COURT: I won't argue with you. I feel quite strongly there's probable cause under the circumstances, what you've indicated, and what has not been opposed by Mr. MacLaren thus far. I mean, here is the decedent found in her home and her husband had been there the night before, and evidence, as you say, of prior incompatibility, and this strong—strong grounds for probable cause. I'm not concerned about it under the circumstances here.

And there's exigencies of the situation here; demanded immediate action, I would think, almost urgent action, as far as the—following the general practice, and the better practice, to go before a police officer and get a warrant. But, as the laws indicate, I think you have to take into it

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so many things, the nature of the crime, the seriousness of the crime here, and the manner

in which it was committed, which would lead to a search for this type of evidence. And the purpose of the search and, as I indicated, the exigencies of the situation, as you indicated, there's evidence that could be destroyed momentarily.

But, go ahead. I think, Mr. MacLaren, as I understand, your position is that, in the absence of the arrest, though, there may be probable cause, but there wasn't an arrest here so, therefore, the search cannot be made because it wasn't incident to an arrest. That's one of your strong grounds, is it not?

MR. MacLAREN: My argument is this: The Constitution forbids any kind of a search without a warrant. The cases have come down. There are exceptions. There are two I can think of. One is incident to an arrest. There's no arrest here.

This emergency situation here, Counsel cannot come forward and show the Court a case and say this is that type of emergency situation. The officer had possession of that knowledge all during that day, Your Honor. They knew all this.

Now, the Court may be impressed by the idea this happened in the evening. Well, I know the Court is aware that magistrates are available at all times for the issuance

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of search warrants. Now, when I was in the District Attorney's office, many occasions I went down to the Police Station at late hours, talked to the officers,

and it looked like there was enough here for a search warrant, we sought out one of the judges. I found Judge Labadie is always available.

I think, if the Court allows this type of thing here, you might as well strike out the last part in the Oregon Constitution that talks about search warrants because, if you allow the officers to search without a warrant, and without it being incident to a lawful arrest, why even have a search warrant. They can say, "Well, we just had to do it, Your Honor." But I think the language in State versus Chinn [231 Or. 259, 373 P.2d 392 (1963),] is just what the Court—magistrates rather than police officers are to decide what and when the privacy of the home is to be disturbed. Of course, the Constitution puts, as I pointed out in here, the person is entitled to the same protection as his home. There can't be any argument about that.

There isn't any reason in the world, if they feel they had probable cause, they didn't see fit to make an arrest at that time. They're making an investigation, an exploratory search. This is condemned by all of the cases. I'll agree that Counsel's got some good logic here, but it's not supported by the law. The law is to the effect that, in

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Oregon, you have to have a search warrant, except where there's a search incident to a lawful arrest. If they had arrested the man incident to that, they'd done that, I think probably we wouldn't have too much to argue about.

THE COURT: Let me ask you this: What do you think about Justice Goodwin's remarks in the Krogness case, [*State v. Krogness*, 238 Or. 135, 388 P.2d 120 (1963),] where, here you had no question, you objected, you as the counsel objected and the defendant objected, to a search being made to the person? Right?

MR. MacLAREN: Right.

THE COURT: Then they went ahead and did it anyway. Doesn't that constitute an arrest, wouldn't you say, without the—

MR. MacLAREN: I would think not, Your Honor. Even if it did, as they point out in Chinn, as a general exploratory search accompanied by an arrest upon some convenient charge, even if you say he was detained here and this was an arrest, and this was incident to it, if he was—the reason for the detention was for the search. Just like they're talking about here, like you stop a man out on a street on a traffic charge, some burglary detectives stop him,—

THE COURT: Except you absent the element of probable cause though, so it's more than just a search—we do have probable cause, I feel there is probable cause

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here.

MR. MacLAREN: Maybe the magistrate would feel that, too, Your Honor, but we do not know because—

THE COURT: I mean, proper vehicle to go along with the reasonable suspicion.

MR. MacLAREN: The Court is, of course, aware of

the evidence that did develop, and I don't think that can be allowed to bolster up the case. The man was there—

THE COURT: All right. Well, you know what I'm doing. I want to hear some argument here. And you both submitted—

MR. MacLAREN: Well, I appreciate that, Your Honor.

THE COURT: —your written memoranda. And, what I'm going to do in this case,—and I'm not foreclosing any further argument. Mr. Tanzer's here, if you want to be heard (to Mr. Tanzer). Or, if your partner is here, likewise, he can be heard, put it in the record (to Mr. MacLaren). My feeling is, the facts are stipulated to, I'm just going to get this matter—everything in the record you want to put in here, and the argument. I'm going to reserve ruling on this and direct you to proceed on voir dire of this jury.

And I also direct you—I don't think it's necessary,

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but it would certainly be in opening statement, if I deny to it, you will have to refer to it in opening statement—but, in voir dire, I don't think any counsel has to make comment on this matter. That would give me time to study this matter at least the rest of the day.

MR. MacLAREN: One more thing, Your Honor. I don't think Mr. O'Dell will raise this. There's no issue as to the timeliness of the motion. Is that correct?

MR. O'DELL: That's correct. I told counsel I wouldn't object.

THE COURT: Fine. I wouldn't think so in a case like this. That's all right. It came in Friday, but that's fine.

MR. MacLAREN: We had a couple days.

THE COURT: Mr. Tanzer, do you wish to add anything to the legal aspect?

MR. TANZER: I'd like to counter Mr. MacLaren's argument a little. I brought along the case State versus Ramon [, 248 Or. 96, 432 P.2d 507 (1967)]. It quotes from the Robinowitz [sic] cited last spring in Cooper versus California [, 386 U.S. 58 (1967),] by the U. S. Supreme Court, and the Oregon Court adopts, in a situation which is really a pure probable cause search without a warrant two days after the arrest, that it's not incident to the arrest. That was a search of a car, but they cited this. But they cited this Robinowitz language, which is pertinent to Mr. MacLaren's

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argument that you have to have a warrant, and there might have been a magistrate around. So it says that the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.

And there Mr. MacLaren's argument, which Justice O'Connell still holds with, in the minority, comes from an old case called Trupiano [v. United States, 334 U.S. 699 (1948)], which did hold, if at all possible to get a

warrant, you had to go get it. But that's expressly reversed in this Robinowitz case.

I'll show you the Ramon case, if you wish (handing to the Court) and this idea about the arrest; the language I read is bracketed there.

In that case, during a surveillance, the officer—it was a surveillance of narcotics case. And the officer spotted what he thought were probably marijuana flakes in the back seat of an automobile. He saw it through the window. They arrested the defendant and took the car down to the station and, two days later, they searched the car without a warrant, two days after the arrest. This was the holding.

When he says, too, we should have arrested if we wanted to search, why, I'd refer you to the case of Hoffa versus United States [, 385 U.S. 293 (1966)], which is in the most recent U. S. Supreme Court Reports. It says simply that there's no Constitutional right to be arrested. But it says more. It recognizes that

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there are instances where police may have to arrest on probable cause, but it says that, certainly, in proper cases, it recognizes that that's not a good time to arrest; that, while they may have probable cause, it's certainly not enough to go to a jury,—

THE COURT: All right.

MR. TANZER: —and they should have allotted time to continue their investigation.

THE COURT: I'm aware of that.

MR. O'DELL: That, I believe, is set out in that memorandum.

THE COURT: Yes.

MR. MacLAREN: Let me ask you this, Mr. Tanzer: Is there any case, that you're aware of, that says there may be a search made without a warrant, without an arrest, and, I think, without these emergency circumstances? Is there any such case?

MR. TANZER: Well, I think Ramon is one. I've seen the cases that say all searches have to be either with warrant or—or incident to arrest, and—and, yet, I've not seen any of those cases that actually dealt with a straight probable cause search and threw it out, you see.

MR. MacLAREN: Or held it in.

MR. TANZER: Or held it in, either way.

THE COURT: I think so. I think that's

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what the Court's faced with here this morning.

MR. O'DELL: That's correct.

THE COURT: Under the circumstances of this case, as I said before, the exigencies, and seriousness of it, the purpose of the search, even the evidence obtained, this isn't just somebody's checkbook or something, this is real damaging evidence, as I indicated. That's why I'm holding this in Chambers here because, if the State's theory —if this ties up, I'm not secondguessing, but, for the purpose of this argument, it appears to be where the murder was accomplished in this manner.

MR. O'DELL: There's a couple other points I'd like

to answer in Mr. MacLaren's argument. He stated, number one, that this was—there was no arrest performed; that, had there been an arrest performed, that we probably wouldn't be here. That's really the nub of the question: Is there a duty of the police upon the arriving at probable cause?

As Mr. Tanzer stated, and my brief states, Hoffa is there. We could have made in this case a convenient arrest. The facts don't state it, but I think I could adduce testimony to the fact that he had been drinking, and he was in a public place.

We got away—we're getting away from this arresting on a citation for an improper left turn, or from drunk in a

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public place, in order to give the facade of validity of it. This has been criticized. An arrest for convenience could have been made. I'll put it for the record. It's been bad practice, agreed to by counsel.

THE COURT: And the Courts, too. At least by this Court.

MR. O'DELL: This was not made in this case. Also the evidence, and I could produce testimony to this effect, which does not show in the brief, Detective Hutchins noticed, prior to requesting the fingernail scrapings, under the thumb of the defendant, a black glob of something. He doesn't know what that is, but, again, put in the context of the framework of the facts of this case.

he says, "Aha," and asked for the fingernail scrapings at that point. So we do even have partial application of the plain view doctrine.

THE COURT: All right. Yes. Of course, I think this was search though. I'm not being arbitrary on that point. I think there's a search.

MR. O'DELL: There's one other matter, if I might. Now, the Court wishes to take time on this; it's a weighty matter, I understand that. However, if I could request, I would, before placing the defendant in jeopardy, as such, I would, in the event the motion's not allowed—it would require some serious consultation with my office—and, before placing the defendant in jeopardy, technically, by

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calling a witness, or wherever jeopardy attaches nowadays, I would like to avoid that, if I might, prior to obtaining a ruling.

THE COURT: It's my feeling just voir dire of the jury isn't putting him in jeopardy.

MR. O'DELL: I don't know. Swearing them certainly is. Swearing the jury is.

THE COURT: Swearing the jury is.

MR. TANZER: I don't know if jeopardy attaches when you call a jury or not.

THE COURT: Gentlemen, I assume we'll be spending the day picking the jury here. I expect a determination on it before tomorrow morning. So, if I haven't got

my mind made up this afternoon, we'll just recess wherever we are before we swear the jury.

MR. O'DELL: Is there any objection to that, Counsel?

MR. MacLAREN: No, it's just a—

THE COURT: I want to spend some time on this matter.

MR. MacLAREN: Certainly. I think the matter—it'll work out we'll be busy right up 'til five on the voir dire and the jury won't be sworn 'til tomorrow in any event.

THE COURT: As I say, it's four o'clock.

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Looks like you'll be through with your pre-emptories and everything. I'll recess until tomorrow morning and we'll have a decision, if not before.

MR. O'DELL: I understand, certainly.

THE COURT: That's just a general pattern. One other thing—two other things, for the record. I think, Mr. District Attorney, you'll stipulate the defendant actually wasn't arrested for about a month. Is that right?

MR. O'DELL: He was arrested as a result of a warrant from a Grand Jury indictment. And I believe it was September—I set it forth in my memorandum, I thought.

MR. MacLAREN: Approximately a month.

MR. O'DELL: Approximately September 22nd, 1967.

THE COURT: Now, was there any reason for waiting that long? For the record, Mr. MacLaren's made

an issue of the fact that you waited that long. Of course, you've argued there's no Constitutional right to be arrested. But, as I recall, and it's a matter of record here, that the defendant had four children at home, did he not? Was that given some consideration?

MR. O'DELL: If the Court wants the honest reason for waiting that long, we felt that, after all the facts were gathered, that we had a case. I talked to Mr. MacLaren, personally. I'm sure he'll recognize this. He

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knew it was going to Grand Jury, and I knew it was going to Grand Jury. He simply asked me to keep him informed of the progress because of the business situations. That's the reason we didn't go out and call him later.

THE COURT: I just think there should be something in the record. Another thing: What time of the day did you determine that the victim was strangled?

MR. O'DELL: Well, this was apparent, Your Honor, upon arriving at the scene,—

THE COURT: Oh.

MR. O'DELL: —even to the layman. However, Dr. Brady did not come out with his conclusions, as I recall, —now, Mr. Barton was on our case for the office during the day, but, as I—to the best of my recollection, we had the official determination of this around midafternoon.

MR. MacLAREN: You had probable cause to believe that she'd been strangled about eight a. m.

MR. O'DELL: Precisely. As I said, upon arrival at the scene, a layman would be able to speculate she had been strangled.

THE COURT: Beyond the field of speculation, it wasn't until later that you got the coroner's report that you had—

MR. O'DELL: It was midafternoon when we

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had the official word of the cause of death.

MR. TANZER: And the defendant was down in Southern Oregon. That caused the time—

MR. O'DELL: He was clear on the Metolius River and he didn't return until eight or so in the evening.

THE COURT: I know. Mr. MacLaren's made a strong point here, that you did have a probable cause in the middle of the afternoon; that you already had a professional opinion on it that it was strangulation; and there was evidence on the neck, I think came out in the other hearing Wednesday, that the neck had been cut, therefore, whoever did it would—in all probability, may have had some evidence under the fingernail.

MR. O'DELL: That's true. There was other evidence which were accumulated throughout the day, during the day and throughout the day, that gave us the totality of the facts. The defendant, for instance: We didn't do this until we got a complete neighborhood background.

THE COURT: That's what I'm getting at. Oh, I see. You may have known the strangulation. Until the pres-

ence of evidence outside of the bedroom of, probably, a prowler,—

MR. O'DELL: We had evidence at that point which had thrown us off the track, and we didn't gather all

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this evidence together until later in the day.

MR. MacLAREN: By five.

MR. O'DELL: I can't actually tell you.

THE DEFENDANT: My son knew where I was, as soon as the police arrived there.

MR. MacLAREN: Well, Your Honor, if the Court is, in making its decision, placing weight on the sequence of time that day, I think maybe we ought to go into that. I'm not, for a moment, tending to impune Mr. O'Dell, but I don't think we exactly know when everything happened that day, from your knowledge or mine. Do we, Mr. O'Dell?

MR. O'DELL: No, nor do I think, in the collective mind of police officers, we'll be able to pin down each event as to hour.

MR. MacLAREN: Well, if the Court is going to put some weight on whether or not the police had their probable cause, such as it was, during the normal judicial hours, I think maybe we ought to inquire into that at some greater length.

THE COURT: You're urging that, aren't you?

MR. MacLaren: That's my position. If they knew as much by nine o'clock, they knew as much by five o'clock.

MR. O'DELL: Your Honor, particularly based upon the October 13th case of Ramon, this is not even

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relevant.

THE COURT: I know. Mr. Tanzer just finished—

MR. MacLAREN: This is one of the elements, I think, going to reasonableness, don't you, Mr. O'Dell?

MR. O'DELL: Not at all; not at all.

THE COURT: No. I see the State's position. No. I mean, the mere formality of getting the warrant because, let's be frank about it, it doesn't take much to get a warrant from a magistrate.

MR. MacLAREN: Your Honor, the Constitution isn't a mere formality. That's our position. You can't do it without going before a magistrate.

THE COURT: I understand; I understand your authority for it. And the question is whether they can under the circumstances attendant to this search.

MR. TANZER: I think the question is, isn't it: Once the defendant is there and the police officers are there, and, at that time, regardless of when it accrued, there was probable cause. And the question then is, from that point, was it reasonable for them to act as they did,—

MR. MacLAREN: Well,—

MR. TANZER: —rather than at what point they might have had sufficient to bring it before a magistrate.

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MR. MacLAREN: Well,—

MR. TANZER: In other words, given the facts that

did exist, rather than—rather than searching backwards for, you know, various points of time,—

THE COURT: Well, do you have Detective Hutchins here now?

MR. O'DELL: Certainly available, Your Honor.

THE COURT: Do you want some more evidence in here?

MR. MacLAREN: Well, it's up to the Court. If the Court is not inclined to be impressed by the fact that they had probable cause, if they had it, by five o'clock, during judicial hours, then I don't see any point in it; but, if the Court is impressed with this thought that part of the reasonableness test arises of when the officers could have got a warrant, and I don't think there's any case that you just don't need a warrant any more, that's pretty basic,—

MR. O'DELL: Well, we still maintain the basic test is reasonableness, and that's what the Constitution uses, that word very clearly, and certainly been adopted by the Oregon Supreme Court as recently as October of this year.

THE COURT: All right, that's fine. But, Mr. O'Dell, then I can conceive a situation where you have

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all the reasonableness you have at four o'clock in the afternoon. Probable cause, reasonableness, whatever you want to call it; they're used interchangeably. And crime has been committed; you have knowledge of that. You have knowledge of how it's committed

and so forth. Are we going to say, if we got all that, why bother to go down and get a warrant from the magistrate, if we're satisfied with probable cause, and a search is reasonable? I'm going to start pressing that way because—

MR. MacLAREN: That's just what that Chinn case says. Magistrates are supposed to say probable cause, not the policemen.

THE COURT: If there was, in fact, probable cause. That's your point.

MR. MacLAREN: Well, I think in retrospect, Your Honor, you can't go back now, say, "Well, it's okay fellas. You didn't have to get a warrant because you—after all, look what you found."

THE COURT: What time did the defendant arrive at the police station? It was after five o'clock. Right?

MR. MacLAREN: Seven, seven-thirty, something like that.

MR. O'DELL: Between seven and eight would be the—in that hour.

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THE COURT: All right. Of course, you didn't even know then that he was coming until he appeared. Right?

MR. O'DELL: That's correct.

THE COURT: I mean, he wasn't—he came in voluntarily, as I understand it.

MR. O'DELL: He came in at our request, yes.

MR. MacLAREN: Well, the request was made and,

as far as you knew, he was on his way over. Isn't that correct?

MR. O'DELL: That's correct.

THE COURT: Well, I think we ought to have a little bit here in the record of Detective Hutchins. I mean, when did the officers desire that, or even think about searching this man? I think you indicated he didn't—one factor was that he waited until he arrived, then he thought he saw a blush of blood there that may have given thought of blood at that time.

MR. O'DELL: I'll be glad to see if he's here, Your Honor.

THE COURT: Why don't you do that? I'd just like to have something in the record on that.

(Whereupon Mr. O'Dell left Chambers
and, upon his return,

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the proceedings continued as follows, to-wit:)

STATE'E TESTIMONY

[28]

WILLIAM H. PRUNK,

was thereupon produced as a witness on behalf of the State of Oregon and, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'DELL:

Q Now, for he record, Mr. Prunk, what's your occupation?

A Detective for the Portland Police Department.

Q And how long have you been a detective, or how long have you been a police officer?

A Fifteen years.

Q And you were the detective primarily assigned to investigate the death of Doris Murphy. Is that correct?

A Yes, it is.

Q And what time of day did you arrive on the scene?

A Shortly after eight a. m. It was about (referring to documents—pause)

THE COURT: Well, that's close enough for this purpose here. Was it in the morning?

THE WITNESS: Yes.

THE COURT: You recall definitely?

THE WITNESS: Between eight-ten and eight-thirty.

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THE COURT: All right.

Q (By Mr. O'Dell) Did you have an opportunity to view the body at that point?

A Yes, I did.

Q And I'm not asking you for a medical conclusion, but, from your experience, looking at the body, did you have a layman's opinion as to the cause of death?

A Well, there were marks on her—her throat, lacerations, and abrasions, that appeared that she'd been strangled.

Q Now, later on, this body was taken to the coroner, was it not?

A Yes, it was.

Q And do you recall what time that day, or when—do you recall when, if ever, you received word from the coroner as to the official cause of death? And, if so, try to approximate the time, if it occurred that day.

A Well, the coroner's representative, or deputy coroners, showed up about nine a. m.

Q I'm talking from the doctor himself.

A It was, I believe, the following day.

Q Oh. Now, I've set out here, and perhaps this might be for a correction of the record, in the Statement of Facts, that he had been seen by a witness arrive at the home, and the same witness saw him leave by pushing a truck from the driveway to the street before starting the engine.

[30]

Now, when did you come in possession of that fact from that witness?

A From that witness?

Q Yes.

A It was quite some time after that. I would say over a week.

Q Now, did you at any time during that day come in possession of that same knowledge?

A Yes, I did.

Q And from whom did you obtain that knowledge?

A The defendant.

Q And where did this conversation take place?

A The first time was a telephone conversation. He had telephoned from Camp Sherman to the Detective Office at four p. m.

Q Four p. m. on that day?

A On the day. It was August the 25th.

Q Did you obtain the information regarding the—his presence there at that time?

A Yes. He said that he had been in the driveway in his truck.

THE COURT: Now, wait a minute. He called, you say, the Police Station?

THE WITNESS: Yes.

THE COURT: Voluntarily, himself?

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THE WITNESS: Yes.

THE COURT: At four o'clock in the afternoon.

Q (By Mr. O'Dell) Had he called earlier—

THE DEFENDANT: Your Honor, there was a call there for me to call back.

THE COURT: All right now, just a minute. Just for the record, Mr. Murphy, I'm not—certainly, if you've got information that's vital to the determination of the issues before the Court, I'm certainly going to let it be known, but I suggest that you talk to your attorney.

MR. MacLAREN: Why don't you bring your chair over here, Dan?

THE DEFENDANT: (Complying.)

Q (By Mr. O'Dell) Now, had you earlier in the day determined, as a matter of fact, that the defendant was present at the home prior to four o'clock?

A No.

Q Now, did you have—And this was your first knowledge of that to be a fact. Is that right?

A That's right.

Q Now, during that conversation at four o'clock, had you attempted to contact the defendant earlier?

A Yes, we had.

Q And what method did you use?

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A We had made telephone calls to the resort where he supposedly was living, and a teletype message had been set out requesting that he be located for a death message, and so forth.

Q And your first contact with the defendant was when he returned your call. Is that correct?

A Yes.

Q And you state that was what time again?

A Four p. m.

Q And you stated that, prior to that, you had no actual knowledge that he was at the scene?

A Right. Well, we—we were led to believe, from a conversation with various people, that he had gone to Portland and was going to the—to the Murphy home. However, actually knowing that he was there until he told us that he was there, was the first time we knew about it.

Q Now, had you at this time contacted any other witnesses who saw him in the area prior to four o'clock that day?

A No.

Q Now, were you present when certain fingernail scrapings were taken?

A Yes, I was.

Q And do you recall approximately what time this occurred?

[33]

A I believe it was approximately ten p. m.

Q And who took those scrapings, if you remember?

A Detective Hutchins. I'm not sure on the time.

Q Were you present?

A Yes, I was.

Q And who else was present?

A Attorney Gordon MacLaren, the defendant, and, I believe, Attorney Lloyd Weeser—or, Weiser was his name? I don't know how to spell it.

Q Anyone else you can think of besides those you've mentioned?

A There may have been other detectives present. It's —it's a large office and they come and go; however, they weren't focused on the particular—

Q Was there a representative of our office present?

A Yes, Deputy District Attorney Brad Shiley was there.

Q Now, in your opinion as a police officer, based upon this investigation, when did your attention focus upon this defendant as having probably committed the crime you were investigating, when during that day, if at all?

A Well, I think probably after the conversation on the telephone with him at four p. m.

Q And were you—at that time had you been able to talk to all of the other detective teams that had been working on the matter?

[34]

A No, we hadn't.

Q Now, could I recapitulate briefly what your knowledge was at the time? You knew that she was—probably had died of strangulation?

A Yes.

Q And that she had lacerations on her throat?

A Yes.

Q You had not received official determination of this from the coroner's office at that time?

A No.

Q You found out at four o'clock that day, based upon a conversation with the defendant, that he'd been in the area and had been in the driveway?

A Yes.

Q Now, at any time during the day did you make determination as to the marital relationship between the two?

A Yes. The son, who was present at the time the body was discovered, had told us that his mother and father had, on occasions, had fights.

Q Now, can you tell me about when you came in possession of this knowledge?

A This was before noon that day.

Q But at that time you did not know for a fact that he'd been in the area. Is that correct?

A Not for a fact, no.

[35]

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Now, if you could, relate to the Court the best you can what information you did obtain that day after arriving at the scene, and the conversation with the defendant at four o'clock, and approximately when you obtained this information, to the best of your recollection?

A Well, on our arrival at the scene, we found that the victim was lying in her bed and, as I say, she had quite obviously been strangled, from the marks on her throat. There was no sign of a struggle of any kind, no evidence of robbery; hadn't been molested in any way. She was in an unusual neat-appearing situation. The bed was made to perfection. Her bed undergarments and so forth were placed about the room, folded up very neatly. And there was obviously no signs of robbery.

Discussing with the Pat Murphy, the boy who had discovered his mother, it was learned that the father had been expected in town and had, in fact, phoned the night before that he was coming in. It was also learned that he hadn't been there for quite some time; and that the boy went to bed early that evening so as not to see his father; they didn't get along well; and that he and

the—the defendant and the wife had not gotten along too well.

[36]

Q Now, outside of just investigating the scene itself, what else did you do that day?

A We attempted to contact the people in the neighborhood where we found that the one party who, we were later told by Murphy, had seen him in the driveway, or at least he thought that she had seen him, had left on vacation and was somewhere in Montana. We talked to several of the other neighbors who knew of the Murphys' marital problems.

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) What did they say?

A Well, as I recall, one of them stated that they had been separated for quite some time, and also at one time there was a divorce talked about; however, due to their religion, this didn't come about. Also the son, Pat, had told us that his father had been involved in a fight with his mother one time in the bathroom; and that the Venetian blinds were broken; and that, as a result, the mother had a bad mark on her throat when the fight was over with.

Q Now, can you think of anything else that you did, or acquired about this case, during the day prior to the telephone conversation, outside of just general investi-

gation of the scene, mapping and marking and drawing diagrams, that sort of thing?

[37]

A No.

Q Now, it's already established that you talked to the defendant at four o'clock,—

A Yes.

Q —and that he had returned your call.

A Yes.

Q What was that conversation?

A He asked if his wife was, in fact, dead. And, when I told him that she was, he immediately went into this story about what he had done the evening prior to and the following day after the murder. He wasn't asked what he'd been doing; he just started telling me.

Q What did he tell you?

A He said that he'd left Camp Sherman about eight o'clock on the 24th in his old pickup truck to bring a washing machine into Portland to be repaired. On the way he'd stopped at the Keg and Platter, which was a cocktail lounge on the Salem Highway; and that he'd had a couple refreshers, and he'd talked to the accordianist and the accordianist would probably remember him.

He said he got to his home in Portland and he pulled in the driveway. He'd been drinking, and it was quite late. And the door was locked, and he didn't want to go in to disturb his wife or wake anyone up so he slept in

his pickup truck there in the driveway for a period of the evening

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or early morning. And then later he tried to push his truck out of the driveway because it made a lotta noise and he didn't want to start it up and wake up his wife or anyone in the area. So he tried to push the truck out of the driveway, but it hit against a step or a curbing and he couldn't get it out and finally had to start it up.

And then he drove up to the Sombrero on Hawthorne and pulled around the corner, and he said he again pulled off to the side of the road and slept in the pickup truck until it was daylight.

Then he took his washing machine in to be repaired at the Division Street—or Division Repair Service, and drove around Portland taking care of some business; that he did not have a—well, on this telephone conversation, let me see—that he had just arrived back at Camp Sherman, this being four p. m., and that they had told him that his wife was dead.

This is about the extent of the telephone conversation. At this time we asked him if he could return to Portland, that there were certain things that we would like to discuss with him concerning this. He didn't ask me what had happened to her. He just said that he would come in.

Q Now, he did, in fact, then appear at the station later on. Is that correct?

A Yes, he did.

[39]

Q Can you tell me about what time that was?

A He arrived at seven-forty-five p. m.

Q And eventually counsel was summoned. Is that right?

A Yes.

Q Now, was there—referring specifically to the fingernail scrapings, you state, to the best of your recollection, they were taken around ten o'clock.

A Yes.

Q Now, based upon your recollection of that day, can you tell me when, based upon the totality of these facts, the idea of securing fingernail-scraping evidence occurred to you?

A Well, it was between the time that he arrived at the Police Station and ten p. m.

Q And he arrived at seven-forty-five?

A Yes.

Q Now, referring to the actual taking of the conversa—of the fingernail scrapings itself, can you relate when the request was made, who made it, what they said, and what was said in response to that, please?

A Well, there was quite a time lapse between the time he arrived and the time that his attorney finally arrived. He called one attorney, and then another attorney for a criminal proceeding; the other didn't feel he wanted to handle—

THE COURT: Speak up, will you, so she can get it.

A The first attorney stated that he was more of a civil attorney and thought he should call another attorney. Finally, MacLaren arrived, and this was probably two hours after his first arrival at the scene. After discussing it with MacLaren, they were going to leave. And at this time we had discussed with Mr. Shiley taking fingernail scrapings.

Q Now, when did this discussion—when did that discussion take place?

A This was while Mr. MacLaren and Mr. Murphy and the other attorney were in an office at the Police Station discussing with Mr. Murphy the facts.

Q And what time did this conversation with Mr. Shiley take place?

A I would guess about nine-thirty. Possibly later.

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Well, what made you desire to take the scrapings? What came out? What came up at his arrival at seven-forty-five which brought this idea to your mind, if anything?

A Well, the fact that he was there at the time we felt the murder had taken place, that at this point he had become

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a strong suspect.

Q This was on his arrival. Is that correct?

A Yes. We had discounted the son, after talking to

his son and listening to his story, and also the fact that the son had absolutely no fingernails. He bit his fingernails and his fingernails were well back into the quick. It would be impossible for him to scrape or anything with his fingernails. There were, as we said earlier, lacerations and abrasions on the throat, obviously made by something sharp like a fingernail.

THE COURT: When did you determine the son's fingernails probably weren't long enough to do this?

THE WITNESS: Well, almost immediately on our arrival, and talking to him. And he also came into the Police Station and gave us a court-reported statement and—

Q (By Mr. O'Dell) Can you recall what time of day that occurred, if you know?

A This was shortly before noon.

THE COURT: Well, Detective, early in the investigation you started looking at the boy's fingernails, which is good police work right off the bat, because it looked like strangulation to you. What I can't understand, at four o'clock, when the defendant called you, didn't it occur to you then that probably you were going to look at his fingernails as soon as he came in?

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THE WITNESS: Well, not at that time, it didn't.

THE COURT: It didn't, huh? All right. It was late in the evening until you got the thought, "Well, we better get some scrapings." Is that it?

THE WITNESS: Well, at this time we didn't know

for sure he had been there. He had supposedly left to go there, but there was no indication that he had actually arrived.

THE COURT: Yes, until four o'clock.

THE WITNESS: Yeah.

THE COURT: He admitted it at that time. And the question before the Court: Before the magistrate left that day—they're usually there at five o'clock, at least that's the legal hour the courts are open, according to our statutes—why didn't you ask for a search warrant then?

THE WITNESS: Well, we hadn't heard his side of the story at all, other than the fact that he had come to Portland. And, after he had absolutely refused to discuss the case with us in any way, shape, or form, on the advice of his attorney, we didn't think this was the actions of an innocent man.

THE COURT: Oh. All right.

THE WITNESS: And normally would want to

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know what happened to his wife.

THE COURT: All right.

THE WITNESS: He didn't discuss what had happened to her or anything about it. He just (pause)

MR. O'DELL: I—I—I believe that pretty well frames the day.

THE COURT: All right. Mr. MacLaren, do you have any questions?

MR. MacLAREN: Let me just ask you one thing to start with.

CROSS-EXAMINATION

BY MR. MacLAREN:

Q When you first called over there, isn't it a fact, Detective Prunk, that you told the people at Metolius Resort that you suspected strangulation to be the cause of death?

A No, I think I said we felt she had been murdered.

Q Are you sure you never mentioned strangulation?

A I don't recall that I did.

Q On either of the calls to them?

A Now, on the first call to the resort, this was made by the coroner's office representative, and I didn't talk to them on that occasion.

Q On how many occasions on that day did you talk to anybody, other than Mr. Murphy, at the resort?

[44]

A I called once about noon, I believe, and then—

Q And who did you talk to on that occasion?

A On one occasion I talked to Mark Jones, who was the boy staying there at the resort, and then later on in the day I again called and talked to Mr. Tucker.

Q On your occasion when you talked to Mark Jones, are you positive you didn't tell him that you suspected strangulation?

A If I did, I don't recall it.

Q But you may have?

A I'm almost sure that I said murder.

Q All right. Now, between eight-ten and eight-thirty a. m. that day you discovered that you—what you termed to be a suspected strangulation. Is that correct?

A Yes.

Q You determined that there were marks to the extent of skin being broken at that time?

A Yes.

Q Did you determine that these were the type of marks possibly left by a person with fingernails?

A Yes.

Q And is it true that the first person you discussed the case with, other than the members of the department, was Pat Murphy?

A Yes.

[45]

Q And didn't you determine from you at that time, probably by, say, nine o'clock, that he expected his father was coming in the prior evening?

A Yes.

Q And didn't you determine from him that time, during the preceding night, Pat Murphy had heard a truck out in the driveway?

A He had heard something in the driveway, yes.

Q Didn't you determine from him that Pat thought it was his dad that had come home?

A He didn't say that.

Q He didn't say that at all?

A No.

Q Did you ask him who he thought it was?

A Yes.

Q And what did he say?

A He said he didn't know.

Q Now,—but you did know there was a vehicle in the driveway at that time, or something that sounded like it?

A Yes.

Q And you knew that Mr. Murphy was expected to come home that night?

A Yes.

Q And that was probably by nine o'clock in the morning. Isn't that correct?

[46]

A Well, there was some question in Pat's mind at that time because there was a discussion of this washing machine being left there in the driveway, or in the garage area, and it was not there. And Pat said for this reason he didn't know for sure whether his father had arrived or not.

Q Well, you thought probably he had been there at that point, didn't you?

A We thought possibly he had been there. There was an indication that he had left to come there.

Q Uh-huh. And you knew that he was—Well, strike that. Now, other than what Pat told you, did anybody that you interviewed that day before noon say—give you any indication that Mr. Murphy was in the city of Portland?

A In the telephone conversation with Mark Jones, he said that Murphy had left to come to Portland.

Q So this was another bit of evidence that made you think that Mr. Murphy was possibly in the city of Portland?

A Yes.

Q And that morning before noon Pat told you that there'd been some difficulty between his parents. Is that correct?

A Yes.

Q That was before noon?

A Yes.

Q Now, isn't it a fact, Detective Prunk, that in any manual strangulation case, that you as a homicide detective

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work on, if you see skin's been broken, the first thing that comes into your mind is the thought of physical evidence on the person doing the crime?

A Well, at that point there were two of us handling the investigation. And I don't know whether you've ever been to a homicide investigation, but there are just literally thousands of things that you have to do. And sometimes, after you do all these things, then you have to sit down and decide what you're going to do next. And—

Q Well, this isn't the first strangulation case you ever saw, is it?

A Yes, it is.

Q Is that right?

A Yes.

Q You've read about them; you're a trained detective, aren't you?

A Yes.

Q And you know that textbooks say the first thing—physical evidence is the first thing in a strangulation?

A Usually there's very little physical evidence in a strangulation.

Q Whenever there is is ofttimes under the fingernails?

A True.

Q But you didn't think of that at all until that evening?

A That's right.

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Q And, by four o'clock, there was no question in your mind but what Mr. Murphy had been there and had been in that driveway. Isn't that correct?

A By his own admission.

Q By his own admission and by the other things that you knew to be true. Isn't that correct?

A Yes.

Q And you testified, I believe, that sometime—you didn't have any idea of obtaining scrapings until between seven and ten.

A Actually, the thing of bringing—was brought up by Detective Hutchins, taking the fingernail scrapings.

Q You didn't think of it, he had to bring it up?

A He thought of it, yes. This is about the time it was brought up and discussed with Shiley.

Q Well, after Mr. Murphy got back over there, you didn't really learn anything you didn't already know, did you?

A He went into much more detail on his arriv—

Q Basically, he elaborated on what he already told you?

A Yes.

Q All right. So, other than the fact that he chose not to discuss the case with you any further, there was nothing that you learned after he arrived there that gave you any more cause to suspect him, is there?

A Well, as I say, the fact that he refused to discuss

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the case was the main thing, and the fact that he didn't ask what had happened, or didn't go into any questioning of us of what had happened, I thought it was very unusual.

Q But you assumed that he already knew from what had been told to him at the resort. The main thing that you were placing your idea on then was the fact that he chose not to discuss it with you. Is that the only additional factor?

A This is, I think, the big factor. All we had earlier was the fact that his wife was dead and he had been in the area, or had been there.

Q And, after he got to the Police Station, you didn't gain anything more, did you, other than the fact that he chose not to discuss it with you?

A That is what we mean.

Q So, by four o'clock, other than his refusal, you had everything that you based your decision to get scrapings on. Isn't that correct?

A No. As I said before, I think the thing that stood out mainly in our mind was the fact that he refused to discuss the case.

Q Excuse me. I meant, other than his refusal, you had everything by four o'clock.

A Yes.

MR. MacLAREN: I don't have anything further.

[50]

THE COURT: All right. Anything further?

MR. O'DELL: I don't believe so at this point.

MR. TANZER: (Shaking head in the negative.)

THE COURT: All right. I don't think we'll need any more testimony. You've got this in the record here, what happened here. Again, I'm going to do just what I indicated a few minutes ago. We're going to proceed after recess with voir diring the jury. And I've already indicated what I think the problem is here. Of course, four o'clock, that's when you established he had all this information. There's a thought process the Court has to take into consideration. It's brought out here in the evidence. There's one detective, two thousand things to do.

MR. O'DELL: Your Honor, Detective Hutchins is present and he could testify as to when the idea occurred to him, since he's the one who suggested it. And he can testify to what he saw on the defendant himself and his fingernails. Probably would—

THE COURT: Do you want to put that in the record?

MR. O'DELL: We can put that in, unless counsel is going to stipulate.

MR. MacLAREN: I'm not going to stipulate anything, Your Honor. If the Court wants to hear it,—

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THE COURT: Well, if he's here, I think we should —The question is one of first impression here. We want to get all in the record we can. Let's take a recess until eleven o'clock, Counsel, and reconvene here in Chambers.

(Recess.)

[52]

BENJAMIN PRESCOTT HUTCHINS, was thereupon produced as a witness on behalf of the State of Oregon and, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'DELL:

Q Now, for the record, Mr. Hutchins, your occupation.

A Detective, Portland Police.

Q And how long have you been a police officer?

A Twenty-seven years.

Q Now, were you working with Detective Prunk on the investigation of the death of Doris Murphy?

A I was.

Q And you were with him throughout the day. Is that correct?

A That is true.

Q Now, referring specifically to later on in the evening, do you recall seeing the defendant, Mr. Murphy, in this case?

A I do.

Q And where did you see him, please?

A At the Detective Office, Portland Police.

Q And do you recall, to the best of your recollection, about what time that was?

[53]

A Roughly, about a quarter to eight that evening.

Q Now, at some time during the course of this evening, certain fingernail scrapings were taken from the defendant. Do you recall approximately what time that was?

A Well, I'll say—I would have to estimate this, but I would say it was probably between nine or ten. Probably around nine.

Q Now, do you know, based upon who all was there involved in the investigation, whose idea it was to—to take these scrapings?

A I believe that I suggested that to Detective Prunk.

Q Now, can you tell me why you suggested this and what brought it to your attention?

A Well, I had, during the course of my contact with

the defendant, I had noticed his fingers. And I believe it was the right thumb, I noticed a dark spot.

Q Is this what prompted you to request the scrapings?

A That, and I probably would of anyway.

Q Now,—

(Whereupon discussion was had off the record between the Assistant District Attorneys.)

Q (By Mr. O'Dell) Well, when you observed this thumb of the defendant, this dark spot referred to, what did you suspect that matter might be?

[54]

A Well, it, as blood congeals and gets older, it does get dark, and I thought there was a possibility.

Q Did you—Of course, you've stated that you were with Detective Prunk during the day. You had a chance to view the body?

A Yes.

Q And you saw the throat of the victim?

A Yes, I did.

Q And you were with him during the day, and the interview with his son, Patrick Murphy?

A Yes, I was.

Q And you were in the possession of all of the knowledge that Detective Prunk would have been at that time?

A I was.

Q Did you take into consideration—what other fac-

tors did you take into consideration in prompting you to make this request, other than just viewing that under the fingernail of the defendant?

A Well, originally, we had requested the defendant to come in for the purpose of ascertaining his background, what he had been doing during the course of the day, that immediate evening preceding the finding of the body, and also during the day of the death. And, upon his arrival there, he had showed, and during our conversation with him, had shown an attitude of disinterest in the case, which was unusual to me. I mean,

[55]

no worry about what had happened to his wife, or what we knew about it, or—just total disinterest.

Q Could I ask you: In your opinion as a police officer, 27 years' experience, based upon the totality of everything you knew, when did, in your mind, Mr. Murphy became a prime suspect in the death of his wife?

A Well, he had assumed this disinterest in what we had been doing toward solving it, what had—how the death had come about. And also, in our conversation with him, he had already been advised of his rights. And, shortly thereafter, he came out in the hallway and in front of a detective desk and stated that, while he was waiting for his attorney and off the record, he wanted to talk to us about just what he had done. He admitted in that statement that he had not heard a radio or—or a—or read a newspaper. And just his route of travel that

day was explained to us, that he had been in the driveway of the residence and he had slept there in his car in the driveway. He didn't want to disturb his wife by knocking on the door.

He slept there a short while and, eventually, got up out of his sleep in the car and was going to shove the car out; became stuck in a—back door has a small step that protrudes out into the driveway, and the car, apparently, in backing up, rolling back, had become lodged there. It was necessitated that he do start it up. And his admission that his car was a

[56]

loud and noisy thing; that, in starting, it would wake his wife up anyway. Everything seemed to go together, that—

Q At what point—

A —that probably he knew more than he was telling us.

Q At what point did this everything go together, as you say?

A Well, I would say while we were awaiting the arrival of Mr. MacLaren.

THE COURT: All right..

MR. O'DELL: That's all I have.

CROSS-EXAMINATION

BY MR. MacLAREN:

Q Now, Detective Hutchins, you were out on the crime scene that morning. Isn't that correct?

A (Nodding head in the affirmative.)

Q And you, of course, viewed the body?

A M-hm (nodding head in the affirmative).

Q And you viewed the lacerations on the neck?

A (Nodding head in the affirmative.)

Q And you, of course, have seen a number of strangulation homicides in your day, haven't you, sir?

A Yes, I have.

Q And isn't it true that one of the very first things

[57]

in this type of a case that a trained detective will think about is the securing of physical evidence by way of fingernail scrapings?

A It enters your mind, yes.

Q Well, that's one of the very first things. When you saw those marks there, you wondered if there was somebody walking around with this type of material underneath their fingernails?

A M-hm (nodding head in the affirmative).

Q And that was about between eight and nine a. m. Isn't that correct?

A Well, that and many other things enter your mind, too.

Q Well, all right. But this did, didn't it?

A Yes, it did.

Q And between eight and nine a. m. you talked to Pat Murphy?

A (Nodding head in the affirmative.)

Q Is that correct?

A Yes.

Q And didn't he tell you that he expected that his father was to be in town the preceding evening?

A Yes, he did.

Q Did he tell you about the telephone call that he heard one end of the conversation?

[58]

A That's true.

Q So he knew that his dad was due in town?

A Yes, he did.

Q And you talked to him about having heard some form of motor noise outside his window sometime during the night.?

A Yes.

Q All right. And had he also told you some—some story about a difficulty between his parents at an earlier time?

A Yes, he did.

Q Did he tell you that there'd been some violence?

A Yes.

Q What'd he tell you?

A That his father and his mother had a physical argument approximately a year preceding this.

Q Did he tell you anything about the details thereof?

A That she'd been bruised.

Q Where?

A Oh, the upper parts of the body (indicating).

Q The chest, or where?

A Oh, around the face and neck area.

Q All right. And now, were you present when Detective Prunk talked to Mark Jones earlier, sometime around noon that day? Did you hear his end of the conversation?

A No, I didn't.

[59]

Q All right. So you don't know what—what information Detective Prunk imparted to Mark Jones, do you?

A No.

Q You don't know whether or not Detective Prunk told Mark Jones around noon that strangulation was the suspected cause of death?

A I couldn't say, no.

Q In any event, you, by noon, you were of a mind that Mr. Murphy was probably in the city of Portland sometime during the preceding night, weren't you?

A We had reason to believe that he probably had been.

Q Well, you had reasonable reason to believe that, didn't you?

A Well, we wanted to verify it with him. That's why the phone call.

Q Well, that was the only thing that remained to be done, just confirm it in your mind. Isn't that correct?

A Wasn't the only thing remained to be done.

Q I mean on this point.

A On that point, yeah.

Q So, by noon, you suspected or had good reason

to believe that Mr. Murphy had been in town that preceding evening, right?

A Suspected, yes.

Q All right. And that he had—there was somebody in

[60]

the driveway, and it was probably Mr. Murphy?

Yes.

Q And that there had been a strangulation; that whoever had done this, had broke the skin. Is that correct?

A Probably.

Q Excuse me?

A Probably; in all probability, yes.

Q Well, you know that the skin was broken—

A Yes.

Q —and you knew it at that time, didn't you?

A We didn't know—Mr. Murphy—

Q Excuse me. You misunderstand me. By noon you know this dead person, the skin had been broken around their neck?

A Yes.

Q And that blood had been drawn?

A Yes.

Q And all of this happened by noon and, by four o'clock, you had it confirmed that Mr. Murphy was in town, through his own statement to Detective Prunk. That's correct, isn't it?

A M-hm (nodding head in the affirmative).

Q All right. So between then and—from then on you learned nothing, as far as a factual nature is concerned; you learned nothing about the case, other than maybe had it elaborated a little bit more upon by Mr. Murphy?

[61]

A Excuse me. Going back: How did you word that? At four o'clock—?

Q I probably stated it badly, Mr. Hutchins. From four o'clock on, you learned nothing new about the case from Mr. Murphy, did you, other than he elaborated a little bit more on his activities?

A Well, I was—that was the phone call that he had with Mr. Prunk.

Q All right. I'm talking about you and Mr. Prunk learned nothing. He just elaborated a little more when he got over here, didn't he?

A Yeah, he elaborated a little more on his story.

Q That's about the extent of what you learned from Mr. Murphy?

A Well, offhand, we found out, in his elaboration, where he had been that preceding night, and a little more the stops that he had made.

Q But, again, this was just mainly elaboration on the four o'clock conversation?

A As far as told to me by Detective Prunk. I wasn't in on the phone call.

Q All right. From what you learned, it was just an

elaboration on what Detective Prunk had told you previously?

A Yeah.

Q All right. And, as to this spot under the thumbnail,

[62]

which thumbnail was it?

A The right thumbnail.

Q The right one?

A (Nodding head in the affirmative.)

Q All right. And you weren't able to determine what that was, and you had to dig this material out before you could tell anything about it. Is that correct?

A Oh, I wouldn't definitely say what it was, no, until after it was examined.

Q Until after you searched it out from underneath his thumbnail?

A Yes.

Q Now, this attitude of disinterest, you don't know what Mr. Murphy had been told when he got back to Metolius Resort and before he called Detective Prunk, do you?

A No, I had no way to know what he was told.

Q And the very first time that you had any thought of scraping the fingernails was sometime around what time?

A After his arrival in the Station there.

Q But you testified that, regardless of this dark spot, you probably would have done this anyway.

A That gave me more focal point to do it, but I, if I had not seen it, I probably would have anyway.

Q There's no question in your mind you would have wanted to do this anyway?

[63]

A I would have considered it good, proper police work.

Q In fact, you, as early as in that morning, when you saw the lacerations on the neck, you would consider it good police work to take scrapings from any suspect, wouldn't you?

A I would have anyway, yes.

Q You looked at the fingernails of Pat Murphy, didn't you?

A That was impossible to do.

Q All right. So you ruled that out?

A (Nodding head in the affirmative.)

Q So you wanted at that time to take Mr. Murphy's fingernail scrapings, didn't you?

A I hadn't thought it right then, but—

Q I'm sorry. What?

A I hadn't thought of it right then, no.

Q Didn't you think of it sometime before five—

A There's so many things to do in a murder, homicide investigation, a lota things go through your mind.

Q By four o'clock?

A Then—then, when I decided on it, it was probably a lot later than that.

Q By five o'clock do you think you thought about it?

A (Shaking head in the negative.) It would be an assumption if I did.

Q You don't know?

A I just don't know.

Q But it would be good police work, wouldn't it? By the time four o'clock rolled around and you knew for a fact Mr. Murphy had been in town, wouldn't it be good police work at that time to think about his fingernails?

A Yes, I think so.

Q And essentially you had information at four o'clock that you had at any other time that day, didn't you?

A Not quite.

Q Other than what?

A His lack of interest upon his arrival there, what had occurred to his wife.

Q All right. Let me ask you this: If it hadn't been for this lack of interest, you still would have wanted to take those fingernail scrapings, wouldn't you?

A Well, there's good reason for that, m-hm.

Q You would have, wouldn't you?

A I would of.

Q And, regardless of the dark spot that you thought you saw, you would have taken—wanted—

A I did see a dark spot.

Q Pardon?

A I did see a dark spot.

Q I say, regardless of that, you would have anyway,

[65]

wouldn't you?

A Probably would have.

Q All right. So, as far as what happened after four o'clock, really nothing happened that would have changed your mind about taking the scrapings. Do you follow me?

THE COURT: You've asked that several times now.

MR. MacLAREN: All right. I'll withdraw it, Your Honor. I think the Court is—

THE COURT: I got what I want to know.

MR. O'DELL: Just a couple of questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. O'DELL:

Q Now, prior—based upon the telephone call, of course, you couldn't see the defendant, could you?

A No.

Q And you first saw him physically when he arrived at the Station?

A I did.

Q Is that the first time you had a chance to examine his demeanor and his attitude toward the situation?

A That's true.

Q Is that, in fact, when you first saw his fingernail?

[66]

A That's true.

Q And is this the first time you had a chance to ob-

serve his actions and what he did, actually, regarding this matter?

A This is true.

Q And did you ask him whether or not he would discuss this matter with you after having advised him?

A Yes.

Q And he refused. Is that correct?

A He refused.

Q Did he make any other refusals upon which you based this suspect determination? Did you ask him if he'd do anything else, other than talk to you?

A Yes, sir, I asked him on the fingernail scrapings.

Q Did you ask him about anything else?

A Yes, I did.

Q What was it?

A Polygraph examination.

Q What did he say —

MR. MacLAREN: Your Honor, I'm going to object to that because, regardless of his yes or no about polygraph examination, this isn't something that he can base probable cause on. It's clearly inadmissible.

THE COURT: A lot of this is inadmissible in a court of law out here.

MR. MacLAREN: I think this is the same

[67]

type of thing, of them making probable cause out of the fact that he didn't want to give up his Constitutional rights.

THE COURT: That's fine. I know it's the same

way. I'm sure you notified him. If he got in touch with you, I assume, on cross-examination, that somebody told him not to say a thing, which is right, but that's a matter for the Court to determine here.

People can still tell a police officer here, "I'm not going to speak. I'm aware of my rights." It can still be a matter of impression. That's what I gather from the detectives here.

All right. Do you have anything further?

MR. O'DELL: It's my position, Your Honor,—

THE COURT: Go ahead. I'll leave it in.

MR. O'DELL: —the totality included all these factors. He did not become a prime suspect until that point. It's fine to take a fingernail scraping from someone, but you can't do it until you have probable cause.

THE COURT: I know. That's the thrust of your argument.

MR. O'DELL: That's all I have.

THE COURT: All right. Gentlemen, as I indicated before, the Court is going to take this matter under advisement. * * *

* * * * *

[**(b) Ruling on Motion To Suppress Evidence**]

[**73**]

Tuesday, December 12, 1967
9:30 A. M.

MORNING SESSION

(Whereupon the following proceedings were had in camera:)

THE COURT: Good morning, gentlemen.

MR. O'DELL: Good morning, Your Honor.

THE COURT: Before we proceed further with this trial, as I indicated to you yesterday, I would take this motion, defendant's motion, under submission. And I have studied it and considered the argument and testimony presented by respective counsel on your motion, Mr. MacLaren, to suppress, and feel that the motion should not be allowed.

Now, I will agree with you that the scraping of the defendant's fingernails, as far as this Court is concerned, for evidence, was a search within the meaning of the search and seizure law. Of course, that leaves the crucial question of whether or not the search was a reasonable and valid one.

You will recall that yesterday I indicated that I felt quite strongly that probable cause existed, in this case, for the search. And, add to that, since you finished arguing yesterday, I further feel that, and I think I indicated, the exigencies of the situation, or the circumstances, including the purpose of the search, the manner in which it was made,

[74]

the character of the evidence seized, and the nature and the importance of the crime committed, all add to the reasonableness of the search.

And I further feel that State versus Ramon, [248 Or. 96, 432 P.2d 507 (1967),] cited to the Court by the District Attorney yesterday, * * * support my finding. And you will recall in that case the Court said that:

"It is not answer to say that the police could have

obtained a search warrant for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

And, for these reasons, the Court is hereby denying the motion. * * *

* * * * *

[**(c) Preservation of Exception during Trial**]

[**344**]

Thursday, December 14, 1967
9:42 A. M.

MORNING SESSION

(Whereupon the following proceedings were had in camera:)

MR. MacLAREN: For the purposes of the—protecting the defendant's record here, it is agreed between counsel for the State, Mr. O'Dell, and myself, as counsel for the defendant, in the presence of the Court, that, by defendant's failure to object to the introductilon of State's Exhibit 23, which—and 25—

MR. O'DELL: '6, excuse me, excuse me. Twenty-six.

MR. MacLAREN: Correction: 26—which exhibits contained the fingernail scrapings obtained from the defendant, by not objecting, the defendant did not waive his prior objection, which was in the form of the motion to suppress, which the Court has ruled on, and overruled.

THE COURT: That's right; that's right. By failing to object, you didn't waive any of your rights. * * *

* * * * *

OPINION OF U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DANIEL P. MURPHY, Petitioner,	)	Civil No. 70-883
vs.	)	OPINION
HOYT C. CUPP, Superintendent, Respondent.	)	June 2, 1971

Howard R. Lonergan,
812 Executive Building,
Portland, Oregon 97204,

Attorney for Petitioner.

Lee Johnson,
Attorney General,
Jim G. Russell,
Assistant Attorney General,
State Office Building,
Salem, Oregon 97310,

Attorneys for Respondent.

SOLOMON, Judge:

Daniel P. Murphy was found guilty in the state court of second degree murder. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. He seeks habeas corpus relief here. 28 U.S.C. §§ 2241 et seq.

On the day that Murphy's wife was strangled, the police asked Murphy to report to them for questioning. He came, but objected when the investigating officers requested scrapings from his fingernails. Scrapings were taken and used against him at trial.

He contends that the admission of this evidence violated his federally protected constitutional rights because the scrapings were taken without a warrant and not incident to arrest.

The opinion in the Oregon Court of Appeals reports the circumstances of Mrs. Murphy's death and Murphy's arrest in detail. The Court approved the trial court's finding that the fingernail scrapings were admissible. *State of Oregon v. Murphy,* 90 Or. Adv. Sh. 679, 465 P.2d 900 (Or. App. 1970).

The facts of this case are not disputed. Murphy submitted his petition solely on the state court record. I have reviewed the record. I find that he had a full and fair hearing not only on his motion to suppress but also in the other proceedings in the trial and appellate courts. 28 U.S.C. §§ 2254 (d); *Townsend v. Sain,* 372 U.S. 293, 312-313 (1963).

I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained fingernail scrapings, which Murphy could have destroyed easily if given the opportunity.

The petition is denied.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 (a).

Dated this 2nd day of June, 1971.

/s/ Gus J. Solomon
United States District Judge

JUDGMENT OF U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DANIEL P. MURPHY,	)	
	)	
Petitioner,	)	Civil No. 70-883
	)	
vs.	)	JUDGMENT
	)	
HOYT C. CUPP, Superintendent,	)	ORDER
	)	
Respondent.	)	

Based upon the findings of fact and conclusions of law in the opinion of the Court dated this day, the petition for writ of habeas corpus is dismissed.

Dated this 2nd day of June, 1971.

/s/ Gus J. Solomon
United States District Judge

OPINION OF U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL P. MURPHY,)
)
Petitioner-Appellant,)
)
vs.) No. 71-2203
)
HOYT C. CUPP,)
)
Respondent-Appellee.)

[May 30, 1972]

Appeal from the United States District Court for the District of Oregon

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Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

Murphy is an Oregon state prisoner, convicted of second degree murder. After having exhausted his state remedies, he filed a petition for habeas corpus relief in the District Court, alleging therein that he had been the victim of a search proscribed by the federal constitution. The District Court denied the petition, and this appeal followed.

The victim of the homicide was Murphy's wife, and sometime after her body was discovered, Murphy and his attorney were present in the station of the investi-

gating police officers. The police expressed a desire to take scrapings from Murphy's fingernails. Acting upon the advice of his attorney, made in the presence of the police, Murphy protested, claiming that such a search would be illegal. The police insisted, and Murphy, declining to provoke violence, submitted to the search while, at the same time, expressly reserving his right to continue, in the future, to urge that the search was constitutionally impermissible. Thereafter, in the state court trial that culminated in Murphy's conviction, the prosecution introduced the scrapings into evidence over Murphy's objection.

The appellee has conceded that Murphy was not under arrest at the time the challenged search was made, and our review of the record convinces us that there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant. *See Vale v. Louisiana,* 399 U.S. 30, 34-35, 26 L. Ed. 2d 409, 413-14, 90 S. Ct. 1969, 1971-72 (1970); *Schmerber v. California,* 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966). Thus, the search was illegal. *See Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 22 L. Ed. 2d 676, 681, [sic] 91 S. Ct. 2022, 2031-32 (1971). *Cf. Davis v. Mississippi,* 394 U.S. 721, 727-28, 29 L. Ed. 2d 564, 575-76, [sic] 89 S. Ct. 1394, 1397-98 (1969).

Upon remand, the District Court will hold Murphy's

petition in abeyance for a reasonable time, not exceeding sixty days, in order to afford the Oregon authorities the opportunity to retry Murphy, should they choose to do so, without the introduction of the impermissible evidence.

Reversed and remanded.

JUDGMENT OF U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL P. MURPHY,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 71-2203
	)	
HOYT C. CUPP,	)	
	)	
Appellee.	)	

APPEAL from the United States District Court for the District of Oregon[.]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 30, 1972[.]

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Title omitted in printing]
[July 6, 1972]

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION OF OREGON COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,)
)
Respondent,)
)
v.)
)
DANIEL PAUL MURPHY,)
)
Appellant.)

[March 12, 1970]

Before SCHWAB, Chief Judge, and LANGTRY and FOLEY, Judges.

AFFIRMED.

SCHWAB, C. J.

The defendant was tried to a jury on the charge of murder of his wife. He was convicted of murder in the second degree. On appeal he contends that fingernail scrapings taken from him against his will were wrongfully received in evidence. The state produced testimony that analysis of the scrapings revealed skin, blood cells, and white cotton fiber. This evidence was obviously introduced as tending to prove that the defendant had acquired these substances under his fingernails by strangling his wife while she was in bed.

At the time the police took the fingernail scrapings they had not formally arrested the defendant. He was not charged with murder or any other crime until about

a month later. The defendant's position is that the police did not have a right to search him by taking scrapings from his fingernails without his consent and without a warrant except as incident to a lawful arrest.

We borrow in large part from the statement of facts in defendant's brief.

On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There was no signs of forced entry, struggle, or robbery. The dectectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective

Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was locked so he slept in the pickup parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take a poly-

graph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him.

1. By holding the defendant long enough to take fingernail scrapings from him, the detectives did not *arrest* the defendant in the strict sense of the word. An *arrest* in its strict sense is the taking of a person into custody for the commission of an offense as the prelude to prosecuting him for it. *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). It follows that the state cannot rely on the rule that "The notable exception to the demand for a search warrant is, of course, the search made as an incident of a lawful arrest." *State v. Chinn*, 231 Or 259, 373 P2d 392 (1962). This rule, however, is not determinative of the case at hand for, while the incident-to-arrest exception is "notable," it does not follow that it is exclusive.

> "* * * In terms of the quantum of evidence required, this [probable cause for a search] is substantially the equivalent of the probable cause needed for an arrest warrant and of the reasonable grounds needed for an arrest without warrant." LaFave, *Search and Seizure: The Course of True Law * * * Has Not * * * Run Smooth*. 255 Ill L Forum 259-60 (1966).

2. In the usual situation, as in this case, the same evidence that constitutes probable cause to arrest constitutes probable cause to search the person arrested for evidence of the crime for which he is seized. Perhaps this is the reason that in many cases courts have upheld

warrantless searches which came prior to arrest by characterizing the searches as "incident to arrest."

"Search before arrest is not uncommon in current practice. In some instances, the search precedes the formal announcement of arrest because it is necessary for the officer to act quickly for his own protection. In many instances, however, no formal announcement is made because the officer knows that the person will not actually be taken to the station unless the search proves to be fruitful. That is, in those cases where the defendant might be arrested because of reasonable grounds to believe he presently possesses contraband, the common sense sequence—as far as the police are concerned—is search followed by arrest only if contraband is found, as opposed to arrest, search, and then release if nothing is found.

"In these and similar cases, the better view is that the search is not unlawful merely because it precedes the arrest. Such is the California position, which has been explained as follows:

" 'Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.'[284]"

"* * * * *.

"[284] People v. Simon, 45 Cal. 2d 645, 648, 290 P.2d 531, 533 (1955)." LaFave, *Search and Seizure* * * *, supra, at 303.

The majority of the Oregon Supreme Court apparently is of the same mind as the California court in *People v. Simon*, 45 Cal2d 645, 290 P2d 531 (1955). In *State v. Elk*, 249 Or 614, 439 P2d 1011 (1968), those who concurred in the prevailing opinion characterized as incident to arrest a car search which occurred 20 to 25 minutes prior to arrest and 200 to 250 yards away. The search was upheld on the basis of a more realistic, workable and theoretically sound rationale in two concurring opinions which represented the views of four concurring justices. While the two concurring opinions were not in complete agreement on all of the issues of that case they shared the same view on the issue we are here considering. The view upon which the four concurring justices agreed is set forth in that portion of Mr. Justice O'CONNELL'S opinion which states:

> "The majority opinion upholds the search in the present case on the ground that it was incident to the arrest. This is erroneous. A search and seizure cannot be an 'incident' of an arrest which took place at a later time. It is not made any the more so by assertions that "the arrest and search were part of one uninterrupted transaction' or that the search is 'not remote in time or place from the site of the arrest.'
>
> "However, the search and seizure in the present case can be upheld upon another ground. The information Officer Rothermel had received, together with his observations before lifting the trunk lid, was sufficient to give him probable cause to believe that the

stolen gun was in the trunk. Upon the basis of this information, there would have been no difficulty in obtaining a search warrant. But to obtain a warrant it would have been necessary for Rothermel to leave the car and if he left it he could not know when the person who drove the car there would return and drive it away together with the evidence in it. Rothermel had been informed that those who had driven up in the car were in the immediate vicinity. Because of the risk of losing the evidence if a warrant were sought, it was impracticable to obtain a warrant. Under these circumstances a search of the trunk was reasonable." *State v. Elk*, supra, at 624-25.

3. If the police had probable cause to search the defendant and probable cause to believe that it was necessary that they search him without taking the time to first obtain a search warrant, their right to search him immediately was not defeated by their failure to exercise their right to arrest him. "There is no constitutional right to be arrested." *Hoffa v. United States*, 385 US 293, 87 S Ct 408, 17 L Ed 2d 374, reh den 386 US 940 (1966). To hold otherwise would be to require the police to arrest so as to search incident to that arrest. The court should not require greater invasion of privacy where lesser invasion would satisfy the public purpose. Situations exist where arrest would be unwise despite the circumstances of probable cause. Cf. *Hoffa v. United States*, supra. While the existence of probable cause authorizes state seizure by way of (1) arrest, and (2) search to prevent destruction of evidence (see *State v. Chinn*, supra, at 267), there appears no reason to require the police to do both or neither. If the public safety is

satisfied by the lesser invasion of defendant's privacy, by search alone, the law should not encourage, or indeed require, the police to arrest prematurely in order to justify a search already justified by prior probable cause.

4. We hold that the right of the police to search without a warrant is a right not solely dependent upon a prior or contemporaneous arrest. The relevant issue is not whether the defendant was arrested, but whether the warrantless search was based on probable cause. The questions basic to this determination are:

> (1) Did the police have probable cause to believe that a search of the defendant's person would result in the finding of evidence of homicide?
>
> (2) Did the police have probable cause to believe that if the search were not made immediately without taking the time to seek and obtain a warrant the evidence might well be lost?

State v. Keith, 2 Or App 133, 465 P2d 724, Sup Ct.

5. The facts in the case at hand justified the warrantless search. At the time the police took the fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife. They did not have evidence beyond a reasonable doubt, but they did have what they needed, i.e., reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief. *State v. Keith*, supra.

One of the detectives who had had previous experience in this type of homicide knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood, skin and fibers could

sometimes be found under the fingernails of assailants in such cases. At the time the detectives took these scrapings they knew:

> The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.
>
> The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.
>
> The defendant and his deceased wife had had a stormy marriage and did not get along well.
>
> The defendant had, in fact, been at his home on the night of the murder. He left and drove back to central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate.

Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.

Affirmed.

Supreme Court of the United States

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

Daniel P. Murphy

ORDER ALLOWING CERTIORARI. Filed December 4 ---------- , 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1972

No. .....

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Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Hoyt C. Cupp, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 30, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals, not yet reported, is reprinted as Appendix A hereto. The opinion of the United States District Court for the District of Oregon, not reported, is reprinted as Appendix C hereto. The opinion of the Court of Appeals of the State of Oregon affirming respondent's conviction of second degree murder is reported at 2 Or. App. 251,

465 P.2d 900, cert. denied 400 U.S. 944 (1970), and is reprinted as Appendix D hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 30, 1972. A timely petition for rehearing en banc was denied on July 6, 1972 (see Appendix B), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Fourth Amendment prohibit police officers from momentarily detaining a murder suspect who is not in custody and scraping his fingernails for evidence, without obtaining a search warrant or formally arresting the suspect, when the police in fact have probable cause to arrest or search the suspect, and when the delay required to obtain a warrant would frustrate the search by allowing the suspect to clean his fingernails?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A state-court jury convicted Daniel P. Murphy, respondent herein, of the second degree murder of his wife. His conviction was affirmed by the Oregon Court of Appeals. *State v. Murphy,* 2 Or. App. 251, 465 P.2d 900 (1970) (Appendix D). This Court denied his petition for certiorari. 400 U.S. 944 (1970).

Murphy then commenced the present federal habeas corpus action in the United States District Court for the District of Oregon. The district court, per Solomon, J., denied the petition (Appendix C). On appeal, the Ninth Circuit, in a per curiam opinion by Jertberg, Ely, and Hufstedler, JJ., reversed and remanded (Appendix A). Murphy's present custodian, the petitioner herein, seeks review of the Ninth Circuit's decision.

Only one issue has been raised and preserved throughout these proceedings. In Murphy's state court trial, as part of its showing that Murphy strangled his wife while she was in bed, the prosecution introduced evidence that certain scrapings taken from under Murphy's fingernails consisted in part of skin cells, blood cells, and white cotton fiber. Murphy contends, and petitioner herein denies, that the fingernail scrapings in question were unconstitutionally seized from him.

The facts concerning the seizure of the evidence in question are generally undisputed. What follows is the statement of those facts contained in the decision of the Oregon Court of Appeals, which statement is the most complete summary of the facts made by any of the courts below.

"On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There were no signs of forced entry, struggle, or robbery. The detectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from the defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

"At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was

locked so he slept in the pickup parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

"The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take polygraph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him."

After reviewing these facts, both the Oregon Court of Appeals and the federal district court held, in essence, that:

(1) At the time they obtained the fingernail scrapings in question, the police had probable cause to search Murphy's person, or to arrest him, or both.

(2) Since the police had probable cause to arrest him, Murphy could not complain of the fact that, after the police had discussed the taking of fingernail scrapings with a deputy district attorney, Murphy himself, and defense cousel, Murphy was merely detained while the scrapings were taken and then released; and

(3) The police were justified in immediately taking the fingernail scrapings from Murphy, since any effort to obtain a warrant for that purpose would have required the police, not only to detain him longer than they did, but also to restrain him, guard him or otherwise place him in a position where he could not destroy the evidence in question by clipping his nails, putting his hands in his mouth, going to the lavatory, or cleaning his hands in some other way.

The Ninth Circuit, however, disagreed, saying that

"* * * there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant."

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important question of Fourth Amendment law in a way in conflict with the final decision of the courts of the State of Oregon on precisely the same question.

See Appendices A and D, below.

B. The Court of Appeals has decided an important question of Fourth Amendment law in a way in conflict with the applicable decisions of this Court.

As noted above, both the Oregon Court of Appeals and the federal district court held that the police had probable cause either to get a warrant to search Murphy's person or to arrest him at the time they obtained the evidence challenged in these proceedings. The Ninth Circuit's opinion in this case also assumes that such probable cause existed, but nevertheless holds

that there were no exigent circumstances justifying the warrantless search and seizure which took place. This holding is clearly at variance with the decisions of this Court which recognize that the Fourth Amendment does not prohibit immediate action by the police, when the delay involved in obtaining a warrant is likely to result in the loss of evidence.

Thus, for example, probable cause will clearly support an immediate search of an automobile without a warrant, and without a prior arrest of the occupants, where the potential mobility of the automobile may result in the loss of evidence if an immediate search is not conducted. *Chambers v. Maroney*, 399 U.S. 42, 49 (1970); *Carroll v. United States*, 267 U.S. 132, 158-159 (1925). And immediate seizure of evidence from the person may be justifiable where the evidence will dissipate itself with the lapse of time. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

In this case, the police were clearly confronted with the necessity for immediate action, because of the speed and ease with which Murphy could have destroyed the traces of incriminating evidence found under his fingernails, if left free to do so. Since the police had probable cause to search for that evidence, and needed to act immediately to avoid the risk of its destruction, their scraping of Murphy's fingernails to obtain that evidence was not unreasonable and is not prohibited by the Fourth Amendment.

The opinion of the Ninth Circuit correctly notes that Murphy was not formally under arrest at the time the

challenged search was made, nor was he arrested for some time thereafter. But, as this Court has noted in a somewhat different context, there is no constitutional right to be arrested. *Hoffa v. United States*, 385 U.S. 293, 310 (1966). And in this case, a formal arrest clearly would not in itself have conferred upon Murphy any constitutional protection from the search which was conducted. See, *e.g., United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969) (seizure of hair samples from person in custody); *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968) (examination of defendant's hands under ultraviolet light); *Brent v. White*, 398 F.2d 503 (5th Cir. 1968), cert. denied 393 U.S. 1123 (1969) (genital scrapings revealing rape victim's blood).

Accordingly, there is no reason to hold, as the Ninth Circuit suggests, that the Fourth Amendment requires the police to commit a greater invasion of Murphy's privacy, by formally arresting and detaining him indefinitely, when the lesser action of detaining him only long enough to conduct the challenged search would adequately serve the purpose of the criminal investigation. The search complained of here should not only be tolerated under the Fourth Amendment, but encouraged as preferable to the more drastic alternative of a full-scale arrest for murder.

Finally, this Court has indicated in various factual contexts that Fourth Amendment standards of reasonableness are not inflexible, but permit governmental responses of varying magnitude in proportion to the gravity of the factual situation involved. See, *e.g. Adams*

v. Williams, — U.S. —, 40 U.S.L.W. 4724 (No. 70-283, June 12, 1972); *Chambers v. Maroney,* 399 U.S. 42 (1970); *Terry v. Ohio,* 392 U.S. 1 (1968); *Camara v. Municipal Court,* 387 U.S. 523 (1967); *McCray v. Illinois,* 386 U.S. 300 (1967). In contrast, the opinion of the Ninth Circuit in this case holds that an immediate search of the person cannot be conducted to obviate the clearly present risk herein that highly perishable evidence will be destroyed, and suggests that a formal arrest is always a prerequisite for even the limited search of the person which took place here, on the basis of probable cause therefor and with compelling reasons for immediate action. Such rulings not only represent a mechanical and inflexible reading of the Fourth Amendment at variance with the decisions of this Court, but also have obvious implications beyond the immediate factual context of this case. Accordingly, whether or not this case should stand as a precedent, in the Ninth Circuit and elsewhere, is a question eminently deserving the full consideration of this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LEE JOHNSON
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JOHN W. OSBURN
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THOMAS H. DENNEY
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Counsel for Petitioner

August, 1972

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

DANIEL P. MURPHY,
Petitioner-Appellant,
vs.
HOYT C. CUPP,
Respondent-Appellee.
No. 71-2203

[May 30, 1972]

Appeal from the United States District Court for the District of Oregon

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Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

Murphy is an Oregon state prisoner, convicted of second degree murder. After having exhausted his state remedies, he filed a petition for habeas corpus relief in the District Court, alleging therein that he had been the victim of a search proscribed by the federal constitution. The District Court denied the petition, and this appeal followed.

The victim of the homicide was Murphy's wife, and sometime after her body was discovered, Murphy and his attorney were present in the station of the investigating police officers. The police expressed a desire to

take scrapings from Murphy's fingernails. Acting upon the advice of his attorney, made in the presence of the police, Murphy protested, claiming that such a search would be illegal. The police insisted, and Murphy, declining to provoke violence, submitted to the search while, at the same time, expressly reserving his right to continue, in the future, to urge that the search was constitutionally impermissible. Thereafter, in the state court trial that culminated in Murphy's conviction, the prosecution introduced the scrapings into evidence over Murphy's objection.

The appellee has conceded that Murphy was not under arrest at the time the challenged search was made, and our review of the record convinces us that there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant. *See Vale v. Louisiana,* 399 U.S. 30, 34-35, 26 L. Ed. 2d 409, 413-14, 90 S. Ct. 1969, 1971-72 (1970); *Schmerber v. California,* 384 U.S. 757, 770-71, 16 L. Ed. 2d 908, 919-20, 86 S. Ct. 1826, 1835-36 (1966). Thus, the search was illegal. *See Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 22 22 L. Ed. 2d 676, 681, 91 S. Ct. 2022, 2031-32 (1971). *Cf. Davis v. Mississippi,* 394 U.S. 721, 727-28, 29 L. Ed. 2d 564, 575-76, 89 S. Ct. 1394, 1397-98 (1969).

Upon remand, the District Court will hold Murphy's petition in obeyance for a reasonable time, not exceeding

sixty days, in order to afford the Oregon authorities the opportunity to retry Murphy, should they choose to do so, without the introduction of the impermissible evidence.

Reversed and remanded.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

[July 6, 1972]

Before: JERTBERG, ELY, and HUFSTEDLER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT

DANIEL P. MURPHY, Petitioner,	)	Civil No. 70-883
vs.	)	**OPINION**
HOYT C. CUPP, Superintendent, Respondent.	)	June 2, 1971

* * *

SOLOMON, Judge:

Daniel P. Murphy was found guilty in the state court of second degree murder. The Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. He seeks habeas corpus relief here. 28 U.S.C. §§ 2241 et seq.

On the day that Murphy's wife was strangled, the police asked Murphy to report to them for questioning. He came, but objected when the investigating officers requested scrapings from his fingernails. Scrapings were taken and used against him at trial.

He contends that the admission of this evidence violated his federally protected constitutional rights because the scrapings were taken without a warrant and not incident to arrest.

The opinion in the Oregon Court of Appeals reports the circumstances of Mrs. Murphy's death and Murphy's arrest in detail. The Court approved the trial court's finding that the fingernail scrapings were admissible.

State of Oregon v. Murphy, 90 Or. Adv. Sh. 679, 465 P.2d 900 (Or. App. 1970).

The facts of this case are not disputed. Murphy submitted his petition solely on the state court record. I have reviewed the record. I find that he had a full and fair hearing not only on his motion to suppress but also in the other proceedings in the trial and appellate courts. 28 U.S.C. §§ 2254(d); *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963).

I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained fingernail scrapings, which Murphy could have destroyed easily if given the opportunity.

The petition is denied.

APPENDIX D

OPINION OF OREGON COURT OF APPEALS

[March 12, 1970]

Before Schwab, Chief Judge, and Langtry and Foley, Judges.

Affirmed.

SCHWAB, C. J.

The defendant was tried to a jury on the charge of murder of his wife. He was convicted of murder in the second degree. On appeal he contends that fingernail scrapings taken from him against his will were wrongfully received in evidence. The state produced testimony that analysis of the scrapings revealed skin, blood cells, and white cotton fiber. This evidence was obviously introduced as tending to prove that the defendant had acquired these substances under his fingernails by strangling his wife while she was in bed.

At the time the police took the fingernail scrapings they had not formally arrested the defendant. He was not charged with murder or any other crime until about a month later. The defendant's position is that the police did not have a right to search him by taking scrapings from his fingernails without his consent and without a warrant except as incident to a lawful arrest.

We borrow in large part from the statement of facts in defendant's brief.

On August 25, 1967, City of Portland detectives, Hutchins and Prunk, were assigned to investigate the

murder of Doris Murphy. They arrived at the Murphy home shortly after 8 a.m. They could see throat lacerations and abrasions and it appeared to the detectives that Mrs. Murphy had been strangled. The deceased was lying on her back in bed and the bed was perfectly made up. There were no signs of forced entry, struggle, or robbery. The detectives talked to the son of the deceased and defendant. The son told them that the defendant had been away and had been expected home the night of August 24. By making a telephone call to Camp Sherman, Oregon, and talking to a Mr. Jones, the detectives learned that the defendant had left Camp Sherman on the night of the 24th to go to Portland. They also learned from the defendant's son that the deceased and the defendant did not get along well and in the past "had fights." While talking to the son the detectives noticed that he had "no fingernails." Through Mr. Jones Detective Prunk left a death message at Camp Sherman for defendant.

At 4 p.m. on the same day, August 25, defendant called the Portland police station and talked to Detective Prunk. Without asking any questions about his wife defendant immediately began to tell Prunk where he had been the night before. He also agreed to come to Portland immediately. Defendant told Prunk on the telephone that he had left Camp Sherman about 8 p.m. the night of the 24th in his old pickup to bring a washing machine to Portland to be repaired and on the way had stopped in Salem for a couple of drinks. When he got home the door was locked so he slept in the pickup

parked in the driveway. Early in the morning he woke up and tried to push the truck out of the driveway because it made a lot of noise, but it got caught in the step or curb. He then drove off to another place where he slept until daylight and then took the washing machine to be repaired.

The defendant did return to Portland and went to the Portland police station about 7:45 p.m. When Detective Hutchins saw the defendant in the police station he noticed a dark spot on defendant's right thumb. This prompted him to think about fingernail scrapings although, as he put it, he probably would have anyway in view of the fact that he had observed lacerations on the throat of the deceased. While the defendant and the detectives were discussing the case, two lawyers representing the defendant arrived. The discussion continued after the lawyers arrived and during this time a deputy district attorney who was present and the two detectives discussed taking fingernail scrapings. The defendant refused to give the fingernail scrapings or to take a polygraph test and exhibited a disinterest in the case. Nevertheless, the police detained the defendant long enough to take the scrapings in question and then released him.

By holding the defendant long enough to take fingernail scrapings from him, the detectives did not *arrest* the defendant in the strict sense of the word. An *arrest* in its strict sense is the taking of a person into custody for the commission of an offense as the prelude to prosecuting him for it. *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). It follows

that the state cannot rely on the rule that "The notable exception to the demand for a search warrant is, of course, the search made as an incident of a lawful arrest." *State v. Chinn*, 231 Or 259, 373 P2d 392 (1962). This rule, however, is not determinative of the case at hand for, while the incident-to-arrest exception is "notable" it does not follow that it is exclusive.

> "* * * In terms of the quantum of evidence required, this [probable cause for a search] is substantially the equivalent of the probable cause needed for an arrest warrant and of the reasonable grounds needed for an arrest without warrant." LaFave, *Search and Seizure: The Course of True Law * * * Has not * * * Run Smooth.* 255 Ill L Form 259-60 (1966).

In the usual situation, as in this case, the same evidence that constitutes probable cause to arrest constitutes probable cause to search the person arrested for evidence of the crime for which he is seized. Perhaps this is the reason that in many cases courts have upheld warrantless searches which came prior to arrest by characterizing the searches as "incident to arrest."

> "Search before arrest is not uncommon in current practice. In some instances, the search precedes the formal announcement of arrest because it is necessary for the officer to act quickly for his own protection. In many instances, however, no formal announcement is made because the officer knows that the person will not actually be taken to the station unless the search proves to be fruitful. That is, in those cases where the defendant might be arrested because of reasonable grounds to believe he presently possesses contraband, the common sense sequence—as far as the police are concerned—is search followed by arrest only if contraband is found, as opposed to arrest, search, and then release if nothing is found.

"In these and similar cases, the better view is that the search is not unlawful merely because it precedes the arrest. Such is the California position, which has been explained as follows:

" 'Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.'[284]"

"* * * * *

"[284] People v. Simon, 45 Cal. 2d 645, 648, 290 P.2d 531, 533 (1955)." LaFave, *Search and Seizure* * * –, supra, at 303.

The majority of the Oregon Supreme Court apparently is of the same mind as the California court in *People v. Simon,* 45 Cal2d 645, 290 P2d 531 (1955). In *State v. Elk,* 249 Or 614, 439 P2d 1011 (1968), those who concurred in the prevailing opinion characterized as incident to arrest a car search which occurred 20 to 25 minutes prior to arrest and 200 to 250 yards away. The search was upheld on the basis of a more realistic, workable and theoretically sound rationale in two concurring opinions which represented the views of four concurring justices. While the two concurring opinions

were not in complete agreement on all of the issues of that case they shared the same view on the issue we are here considering. The view upon which the four concurring justices agreed is set forth in that portion of Mr. Justice O'Connell's opinion which states:

> "The majority opinion upholds the search in the present case on the ground that it was incident to the arrest. This is erroneous. A search and seizure cannot be an 'incident' of an arrest which took place at a later time. It is not made any the more so by assertions that 'the arrest and search were part of one uninterrupted transaction' or that the search is 'not remote in time or place from the site of the arrest.'
>
> "However, the search and seizure in the present case can be upheld upon another ground. The information Officer Rothermel had received, together with his observations before lifting the trunk lid, was sufficient to give him probable cause to believe that the stolen gun was in the trunk. Upon the basis of this information, there would have been no difficulty in obtaining a search warrant. But to obtain a warrant it would have been necessary for Rothermel to leave the car and if he left it he could not know when the person who drove the car there would return and drive it away together with the evidence in it. Rothermel had been informed that those who had driven up in the car were in the immediate vicinity. Because of the risk of losing the evidence if a warrant were sought, it was impracticable to obtain a warrant. Under these circumstances a search of the trunk was reasonable." *State v. Elk*, supra, at 624-25.

If the police had probable cause to search the defendant and probable cause to believe that it was necessary that they search him without taking the time to

first obtain a search warrant, their right to search him immediately was not defeated by their failure to exercise their right to arrest him. "There is no constitutional right to be arrested." *Hoffa v. United States,* 385 US 293, 87 S Ct 408, 17 L Ed 2d 374, reh den 386 US 940 (1966). To hold otherwise would be to require the police to arrest so as to search incident to that arrest. The court should not require greater invasion of privacy where lesser invasion would satisfy the public purpose. Situations exist where arrest would be unwise despite the circumstances of probable cause. Cf. *Hoffa v. United States, supra.* While the existence of probable cause authorizes state seizure by way of (1) arrest, and (2) search to prevent destruction of evidence (see *State v. Chinn,* supra, at 267), there appears no reason to require the police to do both or neither. If the public safety is satisfied by the lesser invasion of defendant's privacy, by search alone, the law should not encourage, or indeed require, the police to arrest prematurely in order to justify a search already justified by prior probable cause.

We hold that the right of the police to search without a warrant is a right not solely dependent upon a prior or contemporaneous arrest. The relevant issue is not whether the defendant was arrested, but whether the warrantless search was based on probable cause. The questions basic to this determination are:

(1) Did the police have probable cause to believe that a search of the defendant's person would result in the finding of evidence of homicide?

(2) Did the police have probable cause to believe that if the search were not made immediately without taking the time to seek and obtain a warrant the evidence might well be lost?

State v. Keith, 2 Or App 133, 465 P2d 724, Sup Ct.

The facts in the case at hand justified the warrantless search. At the time the police took the fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife. They did not have evidence beyond a reasonable doubt, but they did have what they needed, i.e., reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief. *State v. Keith,* supra.

One of the detectives who had had previous experience in this type of homicide knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood, skin and fibers could sometimes be found under the fingernails of assailants in such cases. At the time the detectives took these scrapings they knew:

The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.

The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.

The defendant and his deceased wife had had a stormy marriage and did not get along well.

The defendant had, in fact, been at his home on the night of the murder. He left and drove back to

central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate.

Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.

Affirmed.

No. 71-2203

In The

Supreme Court of the United States

OCTOBER TERM 1972

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

DANIEL P. MURPHY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENT IN OPPOSITION

This Court has stated:

" * * * searches conducted without prior approval by judge or magistrate, are per se, unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions."

Coolidge v. New Hampshire, 403 US 443, 454 (1971); *cf. Vale v. Louisiana*, 399 US 30, 34 (1970).

None of these specifically established and well delineated exceptions exist here.

This was not a search incident to an arrest, *Shipley v. California*, 395 US 818; *Chimel v. California*, 395 US 752 (1969), nor in hot pursuit, *Warden v. Hayden*, 387 US 294, 298-299 (1967), nor was the material in the course of destruction, *Schmerber v. California*, 384 US 757, 770-771 (1966), nor a search on probable cause of an automobile in poised condition, *Coolidge v. New Hampshire*, supra, nor a frisk upon an interrogation, *Sibron v. New York*, 392 US 40 (1967).

If searches are to be allowed whenever evidence might be destroyed, then the warrant, the affidavit of probable cause, and the magistrate's determination, are all superfluous, for all evidence on persons, in houses or elsewhere might conceivably be destroyed. If need there be, detention for the time necessary to get a warrant appears reasonable. *U.S. v. Van Leeuwen*, 397 US 249 (1970); *cf. Terry v. Ohio*, 392 US 1 (1968); *Morales v. New York*, 396 US 102 (1969).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
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Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In his memorandum in opposition, respondent Murphy suggests that there were no exigent circumstances in the present case justifying the immediate taking of scrapings from underneath his fingernails, because, *inter alia*, there is nothing in the record which indicates that the evidence in question was in the course of destruction (Memorandum, at 2). This suggestion is refuted by the trial testimony of the deputy district attorney who was present at the time the evidence in question was taken, concerning Murphy's actions immediately after permission was sought to take the scrapings.

"(Whereupon the reporter read back as follows:

'Question—And were you present when the request for fingernail scrapings was made?

'Answer—Yes, I was present at that time.')

"Q [by the prosecutor] Could you see the defendant at that time?

"A Yes, I could.

"Q What did he do when that request was made?

"A Immediately after the request was made, the defendant put both hands behind his back at that time.

"Q Can you stand up and demonstrate to the jury what he did?

"A Yes (complying). He was standing somewhat in this manner. And, immediately upon the request, his hands went behind his back in this fashion (indicating).

"Q Could you see any movement or anything of that sort?

"A Yes, he—his shoulders and the parts of his arms that I could see at that time were both moving in a fashion such as this (indicating).

"Q Did he do anything else with his hands while they were there?

"A Yes. Now, that occurred for a period of time. And then his hands then went into his pockets, one into—went into each of his front pockets of his trousers in that fashion (indicating). At that time I could hear a metallic sound, such as keys or change rattling." (Ex. 1 (Tr. of state court trial), at 311-312).

Respondent Murphy also suggests that under the circumstances of this case, he should, at most, have been formally detained at the police station while the police

applied for a search warrant (Memorandum, at 2). The impracticability of this suggestion under the circumstances presented here was correctly analyzed by the Oregon Court of Appeals when it affirmed Murphy's conviction. The final paragraph of that court's opinion points out the abnormal degree of restraint which would have had to be placed on Murphy throughout any such detention, if such highly perishable evidence as fingernail scrapings was to be preserved, and properly holds that the immediate taking of that evidence was more reasonable and, indeed, preferable under the Fourth Amendment.

> "Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. * * *" *State v. Murphy*, 2 Or. App. 251, 260, 465 P.2d 900, 904-905, cert. denied 400 U.S. 944 (1970).

Respectfully submitted,

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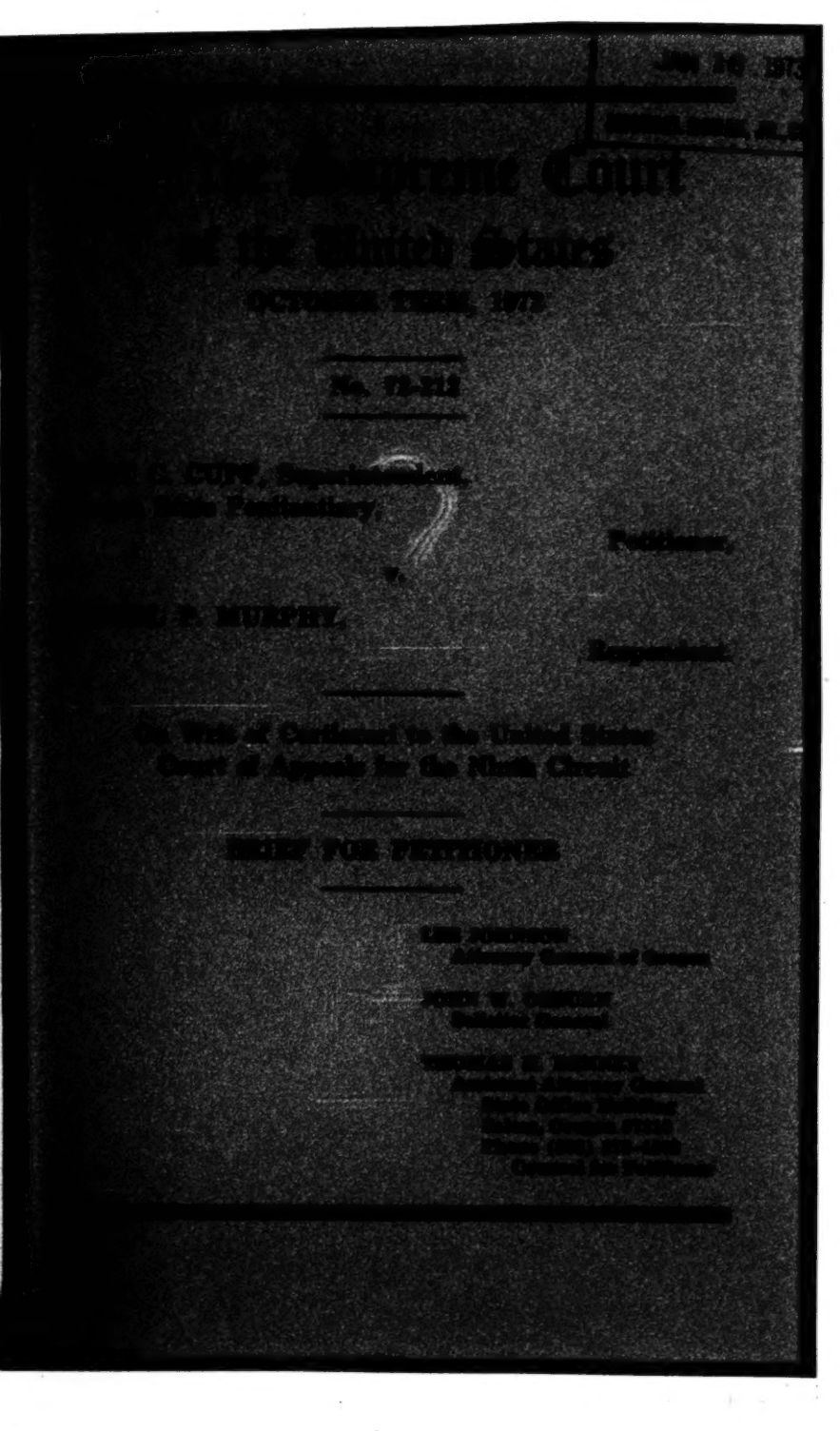
November 1972



SUBJECT INDEX

TABLE OF AUTHORITIES

Cases Cited

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-212

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon court of appeals affirming respondent Murphy's conviction of second degree murder (A. 76-84)[①] is reported at 2 Or. App. 251, 465 P.2d 900, cert. denied 400 U.S. 944 (1970). The opinion of the United States District Court for the District of Oregon denying Murphy's petition for a writ of habeas corpus (A. 68-69) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit

① Throughout this brief, "A." refers to the printed Appendix; "Tr." refers to the 6-volume transcript of Murphy's state-court trial, Exhibit 1 in the present federal habeas corpus proceedings.

reversing the judgment of the district court (A. 71-73) is reported at 461 F.2d 1006 (9th Cir. 1972).

JURISDICTION

The judgment of the United States Court of Appeals (A. 74) was entered on May 30, 1972. A timely petition for rehearing en banc was denied on July 6, 1972 (A. 75). The petition for a writ of certiorari was filed on August 7, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

When police officers have probable cause to arrest or search a murder suspect, does the Fourth Amendment prohibit them from momentarily detaining the suspect and scraping his fingernails for evidence, without obtaining a search warrant or formally arresting him, when the delay required to obtain a warrant would frustrate the search by allowing the suspect to clean his fingernails, and when a formal arrest would cause a greater invasion of the suspect's privacy than the momentary detention and scraping of his fingernails?

STATEMENT OF THE CASE

A state-court jury convicted Daniel P. Murphy, respondent herein, of the second-degree murder of his wife. His conviction was affirmed by the Oregon court of appeals. *State v. Murphy*, 2 Or. App. 251, 465 P.2d 900 (1970) (A. 76-84). This Court denied his petition for a writ of certiorari. 400 U.S. 944 (1970).

Murphy then commenced the present federal habeas corpus action in the United States District Court for the District of Oregon, pursuant to 28 U.S.C. §§ 2241 et seq. Upon review of the state-court record, the district court denied relief (A. 68-70). On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded (A. 71-74). Petitioner Cupp, Murphy's custodian, seeks reversal of the Ninth Circuit's decision and affirmance of the judgment of the district court.

Only one issue has been raised and preserved through-

out these proceedings. In Murphy's state-court trial, as part of its showing that Murphy strangled his wife while she was in bed, the prosecution introduced evidence that certain scrapings taken from under Murphy's fingernails consisted in part of skin cells, blood cells, and white cotton and rayon acetate fibers (Tr. 331-337). Murphy contends, and petitioner herein denies, that the fingernail scrapings in question were unconstitutionally seized from him.

The facts concerning the seizure of the evidence in question are generally undisputed. On the morning of August 25, 1967, Detectives Hutchins and Prunk, of the Portland, Oregon, police bureau, were assigned to investigate the murder of Doris Murphy, whose body had been discovered by the Murphys' son, Patrick (Tr. 28, 35, 52; A. 29, 35, 50-51). They arrived at the Murphy home shortly after 8 a.m. (Tr. 28; A. 29). The deceased was found lying on her back in a perfectly made-up bed. She was clad in a pink and white rayon acetate nightgown, which was fully extended over her body (Tr. 35, 111, 146, 153-154, 278-279, 337-338; A. 35). There were lacerations and abrasions on her throat, of a sort which could have been left by an assailant with fingernails; and it appeared to the detectives that she had been strangled (Tr. 29, 35, 41, 44; A. 29, 35, 41, 44). There were no signs of forcible entry, struggle, or robbery (Tr. 35, 146-154; A. 35).

From Patrick Murphy, the detectives learned that respondent Murphy had not been at the Murphy house

for some time, but had been expected home on the night of August 24, and that Patrick had heard something, apparently the sound of a motor vehicle, in the driveway that night (Tr. 35, 44-45, 58; A. 35, 44, 56). They also learned that Murphy and the deceased had not been getting along well, and that there had been at least one fight between them during the preceding year, after which bruises had been visible on the deceased's face and neck (Tr. 34-36, 58; A. 34-36, 58). While talking to Patrick, the detectives observed that he bit his fingernails so extensively that one of the detectives described him as having "absolutely no fingernails" (Tr. 41; A. 40-41).

About noon on the same day, August 25, Detective Prunk telephoned Camp Sherman, Oregon, where Murphy was then residing, and learned that Murphy had left Camp Sherman to go to Portland the night before and had not returned (Tr. 31-32, 292-293; A. 32). Prunk left word of Mrs. Murphy's death and asked that Murphy call the police station on his return (Tr. 31-32, 279-280, 463; A. 32).

Murphy returned Prunk's call about 4 p.m. (Tr. 37-38; A. 37-38). When Prunk confirmed that Mrs. Murphy was dead, Murphy immediately began an account of where he had been the night before, without asking any questions about his wife's death, and without being asked where he had been (Tr. 37-38, 49; A. 37-38, 48). He told Prunk that he had left Camp Sherman about 8 p.m. on the night of the 24th in an old pickup truck,

to bring a washing machine to Portland to be repaired; that he had stopped in Salem for a couple of drinks on the way and had arrived at his Portland home quite late; that the door of the house was locked, and he had slept in the pickup in the driveway, rather than disturb his wife; that he had awakened after some time and tried to push the truck out of the driveway to avoid making noise, but ultimately had to start the engine; and that he had driven off to another place where he had slept until daylight and then taken the washing machine to be repaired (Tr. 37-38; A. 37-38). At Prunk's request, Murphy then agreed to return to Portland to discuss the case further (Tr. 38; A. 38).

About 7:45 p.m., Murphy came to the Portland police station and talked to Detectives Hutchins and Prunk (Tr. 38-39; A. 38-39)). He repeated essentially the same account of his activities on the night of the 24th that he had related to Detective Prunk over the telephone, but exhibited a general lack of interest in the murder of his wife which struck the detectives as unusual (Tr. 48-49, 54-56; A. 48-49, 52-54).

During the conversation, Detective Hutchins noticed a dark spot under Murphy's right thumbnail (Tr. 53, 61-62; A. 51-52, 60). This prompted him to think about taking fingernail scrapings, although, as he put it, the thought probably would have occurred to him anyway, in view of the lacerations which he had observed on the deceased's throat (Tr. 53, 62-63; A. 52, 60-61).

About 9.30 p.m., while Murphy conferred with two

attorneys who had come to the police station to represent him, the detectives discussed taking fingernail scrapings with a deputy district attorney who was also present (Tr. 32-33, 39-40; A. 33, 39-40). One the advice of his counsel, Murphy refused to consent to the taking of the fingernail scrapings in question (Tr. 66, 310-312; A. 64). Nevertheless, the police detained him long enough to scrape his fingernails, in the presence of defense counsel and others, and then released him (Tr. 32-33, 288-289, 316-317; A. 33). Murphy was not formally arrested until approximately one month later, when the grand jury returned an indictment accusing him of murder (Tr. 19; A. 21).

After reviewing these facts, both the Oregon court of appeals and the federal district court held, in essence, that:

(1) At the time they obtained the fingernail scrapings in question, the police had probable cause to search Murphy's person, or to arrest him, or to do both;

(2) Since the police had probable cause to arrest him, Murphy could not complain of the fact that he was merely detained momentarily, while the scrapings were taken, and then released; and

(3) The police were justified in immediately taking the fingernail scrapings from Murphy, since any effort to obtain a warrant for that purpose would have required the police, not only to detain him longer than they did, but also to restrain him, guard him, or otherwise place him in a position where he could not destroy the evi-

dence in question by clipping his nails, putting his hands in his mouth, going to the lavatory, or cleaning his hands in some other way (A. 68-69, 76-84).

The Ninth Circuit, however, disagreed, saying that:

> "* * * there were no such exigent circumstances existing at the time of the search which would require that it immediately be conducted without the procurement of a warrant, assuming that such probable cause existed as might have justified the issuance of a warrant." (A. 72).

SUMMARY OF ARGUMENT

In this case, the police had ample cause either to arrest Murphy for the murder of his wife or to obtain a warrant to search his person for evidence of that crime. They needed to act immediately, without taking the time to obtain a warrant, because Murphy was aware that the police wished to scrape his fingernails and could easily have destroyed the incriminating evidence found under them, the moment he was left free to do so. The police took the challenged evidence in a reasonable manner, with defense counsel present. Their momentary detention of Murphy was a less serious invasion of his privacy than would have occurred had the police made the full-scale, formal arrest for murder which they had cause to make; and such an arrest would not, in itself, have conferred upon Murphy any constitutional protection from the search which was conducted. Accordingly, the search and seizure in this case was reasonable and should be upheld under the Fourth Amendment.

ARGUMENT

A. There Was Probable Cause for the Police To Act.

As pointed out in the Statement of the Case above, both the Oregon court of appeals and the federal district court held that, at the time the police obtained the evidence challenged in this case, they had probable cause either to arrest Murphy for the murder of his wife or to obtain a warrant authorizing them to scrape his fingernails for evidence of that crime. The Ninth Circuit's opinion also "assumes" that such probable cause existed, and a review of the record herein demonstrates that sufficient cause indeed existed to justify either action.

The police were investigating a murder by strangulation which had apparently been committed the night before the body was discovered. The absence of evidence of forcible entry of the Murphy house suggested that the killer had ready access to the premises. The undisturbed appearance of the bedroom in which the deceased was found indicated that the killer was well known to the deceased. The lack of evidence of robbery further indicated that the killer was not a burglar. Murphy and the deceased were known to have had a stormy marriage, and Murphy was known to have inflicted injuries to the deceased's face and neck in the past. Murphy was known to have been at the house on the night of the murder, although he claimed not to have gone inside. The decedent's son, the only other person in the house on the night in question, did not have fingernails which could

have made the lacerations observed on the victim's throat. When first contacted by the police, Murphy had immediately volunteered a great deal of information concerning his activities on the night in question, yet neither during his initial telephone conversation with the police nor during his conversation at the police station did he display any concern or curiosity about his wife's fate. Finally, when Murphy arrived at the police station, the officers observed a dark spot under one of his thumbnails, which reminded them that, in strangulation cases, physical evidence is frequently found under the fingernails of the assailant, and further suggested that Murphy was indeed the killer of his wife and that evidence of the crime would be found under his fingernails.

The present case is therefore not controlled by *Davis v. Mississippi*, 394 U.S. 721 (1969), one of the principal cases relied on by the Ninth Circuit. *Davis* involved the summary rounding-up and fingerprinting of numerous persons, including the appellant therein, when no probable cause existed for such investigatory detention of any of them. Such cause for the investigatory detention of Murphy was clearly present here.

The present case is also distinguishable from *Davis* in at least three other respects which should be noted in passing, because those distinctions further demonstrate that the police investigation herein was conducted with a reasonableness which was lacking in *Davis*. Davis was summarily taken to the police station against his will; Murphy came to the station voluntarily and was

detained, after he expressed a desire to leave, no longer than was necessary to secure the fingernail scrapings in question. Davis was not afforded counsel at the police station; Murphy had two lawyers assisting him throughout the taking of the evidence in question. And the evidence sought in this case was not of such an indestructable and always-obtainable nature as Davis's fingerprints, but readily-destructible traces of matter under a focal suspect's fingernails.

B. There Were Exigent Circumstances Justifying Immediate Action.

After assuming that such probable cause existed in this case as might have justified the issuance of a warrant authorizing the scraping of Murphy's fingernails, the Ninth Circuit held, contrary to the district court and the Oregon court of appeals, that there were no exigent circumstances which required the police to take immediate action to obtain the evidence challenged in these proceedings. This holding is clearly erroneous.

It is readily apparent that matter under the fingernails can be immediately and irretrievably lost, once the suspect clips his nails or cleans them in any one of a number of ways. And the risk that such evidence will be destroyed is obviously great when, as in this case, the person to be searched is alerted to the fact that the police are seeking that evidence, by a request that he consent to the scraping of his fingernails. The evidence involved in this case is, if anything, even more perishable

than the alcohol in the bloodstream involved in *Schmerber v. California*, 384 U.S. 757 (1966), in which this Court upheld the immediate, warrantless seizure of evidence from the person, when the delay involved in obtaining a warrant is likely to result in the loss of that evidence. The alcohol ingested by Schmerber would dissipate itself only over a comparatively substantial period of time. Murphy could have destroyed the evidence in this case, by clipping or cleaning his fingernails, in a matter of seconds.

Indeed, as previously noted in petitioner's reply to Murphy's memorandum in opposition to certiorari, the record of this case indicates that loss or destruction of the evidence challenged herein was not merely a theoretical possibility, but would actually have occurred if the police had not acted immediately. On trial, both the deputy district attorney who was present when the request for fingernail scrapings was made and the detective who took the scrapings testified that, when the request was made, Murphy "suddenly" and "immediately" looked at his hands and put them behind his back and into his pockets, moving them continuously (See Tr. 311-312, 317; Petitioner's Reply Memorandum, at 2).

For the foregoing reasons, the police were clearly confronted in this case with exigent circumstances justifying immediate action on their part to obtain and preserve the evidence challenged in these proceedings.

C. The Momentary Detention of Murphy Was a Minimal Intrusion upon His Privacy, and More Reasonable Than a Formal Arrest for Murder.

The opinion of the Ninth Circuit notes, as if it were dispositive of the present case, that Murphy was not formally under arrest at the time the challenged search was made, nor was he arrested for some time thereafter. In a similar manner, counsel for Murphy in his state-court trial acknowledged at one point that, if the police had formally arrested Murphy before they scraped his fingernails, "probably we wouldn't have too much to argue about" (Tr. 10-11; A. 13). This tacit assumption that under no circumstances can a search be made without a prior formal arrest, even when probable cause exists which would justify either an arrest or a search, does violence to the Fourth Amendment's standard of reasonableness.

As this Court has stated, in a different context, there is no constitutional right to be arrested: situations exist when arrest would be unwise despite the existence of probable cause. *Cf. Hoffa v. United States,* 385 U.S. 293, 310 (1966). Such a situation is presented here.

In this case, the police had at least that minimum quantum of probable cause which would have justified a formal arrest. Instead, they merely detained Murphy until they had obtained the fingernail scrapings which they sought and then released him. They took the scrapings in a reasonable manner and with defense counsel present. And, unlike the taking of the blood sample involved in *Schmerber v. California,* 384 U.S. 757 (1966),

the taking of that evidence did not require an actual intrusion into the body. The minimal interference with the person which occurred in this case "was so minor an imposition that [Murphy] suffered no true humiliation or affront to his dignity." See *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969) (seizure of hair samples from person in custody). See also *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968) (examination of defendant's hands under ultraviolet light); *Brent v. White*, 398 F.2d 503 (5th Cir. 1968), cert. denied 393 U.S. 1123 (1969) (genital scrapings revealing rape victim's blood).

Surely this momentary detention of Murphy constituted a less serious invasion of his privacy than a full-scale arrest for murder, with its resultant publicity and indefinite detention. The Fourth Amendment should not be held to require a greater invasion of privacy where a lesser one, equally justified, will serve the purpose of the criminal investigation. The search complained of here should not only be tolerated under the Fourth Amendment, but encouraged as more reasonable, and therefore preferable, to the more drastic alternative of a formal arrest.

This Court has held that probable cause will support an immediate search of an automobile, without a warrant, and without a prior arrest of the occupants, where the potential mobility of the automobile makes it likely that evidence will be lost if an immediate search is not conducted. *Chambers v. Maroney*, 399 U.S. 42, 49 (1970); *Carroll v. United States*, 267 U.S. 132, 158-159

(1925). The present case is one in which the actual mobility of a human being and his potential ability to destroy traces of incriminating evidence on his own person call for the application of a similar rule. Or, at the very least, the response of the police to the situation confronting them in this case should be upheld as reasonable, by application of those cases in which this Court has held that Fourth Amendment standards of reasonableness are not inflexible, but permit intermediate governmental responses of varying magnitude, in proportion to the gravity of the factual situation. See, *e.g., Adams v. Williams,* 407 U.S. 143 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968); *McCray v. Illinois,* 386 U.S. 300 (1967).

In his memorandum in opposition to certiorari, Murphy suggested that, rather than being informally detained only momentarily, while the challenged evidence was taken, he should have been formally detained at the police station until a warrant authorizing the scraping of his fingernails could be issued (Memorandum in Opposition, at 2). But there is no greater reason to hold, in the case of persons, than there is in the case of automobiles that immobilization for an indefinite period of time is necessarily a "lesser" intrusion than an immediate search. *Cf. Chambers v. Maroney,* 399 U.S. 42, 51-52 (1970). And in this case, such an abnormal degree of restraint would have had to be placed on Murphy throughout any period of detention, if such highly perishable evidence as fingernail scrapings was to be preserved, that the immediate taking of that evidence was

clearly more reasonable under the Fourth Amendment. As the Oregon court of appeals correctly observed:

> "Unless [Murphy] were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with the nails of another, put his fingers in his mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, it was entirely likely that the evidence would have been destroyed in the interim. Proper application of the Fourth Amendment does not require such extremes. * * *" *State v. Murphy*, 2 Or. App. 251, 260, 465 P.2d 900, 904-905, cert denied 400 U.S. 944 (1970).

CONCLUSION

For the above reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the judgment of the United States District Court for the District of Oregon affirmed.

Respectfully submitted,

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JOHN W. OSBURN
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THOMAS H. DENNEY
Assistant Attorney General
Counsel for Petitioner

January 1973

IN THE

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OCTOBER TERM, 1972.

No. 72-212

HOYT C. CUPP, SUPERINTENDENT,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER AND BRIEF AS AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE OREGON CHAPTER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-212.

HOYT C. CUPP, SUPERINTENDENT,
OREGON STATE PENITENTIARY,

Petitioner,

vs.

DANIEL P. MURPHY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. and the Oregon Chapter of Americans for Effective Law Enforcement, respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made under Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has refused to consent to our filing, consequently we are moving the Court directly for leave to file. Letters from counsel for the petitioner and respondent have been lodged with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE AND OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

I. Interest of the Amici Curiae.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs, *amicus curiae,* in cases of crucial significance with regard to the enforcement of the criminal law. In its *amcius* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very

real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

As the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice has pointed out:

> . . . many . . . decisions are made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs and human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire Nation. (Page 94.)

The articulation called for by the President's Commission is what AELE seeks to accomplish.

The Oregon Chapter of AELE is that state's affiliate with the national organization. The Oregon Chapter is not a separate legal entity but rather an organization of concerned citizens in Oregon, chartered by the national AELE, representing the concern of the citizens of that state. As the instant case arose in Oregon, the Oregon Chapter of AELE has a particular interest in its outcome.

2. Reasons for Desiring to File a Brief Amici Curiae in the Instant Case.

This case involves a search and seizure in the form of the warrantless taking of respondent's fingernail scrapings

by Portland police officers who were investigating the murder of respondent's wife. The state of Oregon must, of course, defend before this Court the legality of that particular search and seizure. We believe that the issues in the case transcend the question of the particular search and seizure and that they involve matters which are of major concern to the effectiveness of law enforcement in the United States.

The instant case involves police action taken to prevent the destruction or disposal of evidence which might be of vital significance in a murder case. Three courts have written opinions in this case. The Court of Appeals of Oregon[1] and the United States District Court for the District of Oregon[2] applied realistic common sense standards of judgment to the police conduct herein and upheld the search and seizure; the United States Court of Appeals for the Ninth Circuit[3] applied legalistic and hypertechnical standards of judgment to the police conduct and held the search to be illegal. The issue of what standards are to be applied by reviewing courts when they are judging police search and seizure conduct is inherent in this case and it is this issue to which we wish to address ourselves, for we believe the issue to be of major importance to law enforcement officers nationwide who are called upon to make search and seizure decisions on a daily basis.

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1. *State* v. *Murphy*, 465 P. 2d 900 (Or. App. 1970). Additionally in the instant case certiorari was denied by the Supreme Court of the United States, 400 U. S. 944 (1971).

2. Memorandum Opinion denying respondent's petition for a writ of habeas corpus. *Murphy* v. *Cupp*, U. S. D. C. Oregon, Civil No. 70-883, June 2, 1971.

3. *Murphy* v. *Cupp*, 461 F. 2d 1006 (9th Cir. 1972).

We therefore, respectfully move the Court for leave to file as *amici curiae*.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE.

Our interest has been set forth above at page 2 in our motion to file this brief as *amici curiae.*

ARGUMENT.

I. Reviewing Courts Should Apply Realistic, Commonsense Standards When Judging the Reasonableness of Police Search and Seizure Practices.

We will not reiterate at any length herein the arguments made by the State of Oregon, although we support them fully and associate ourselves with them. Our argument,

rather, is concerned with the extremely important policy question presented in this case: what standards should appellate courts use when they are called upon to judge whether or not a given search and seizure by law enforcement officers violated the Fourth Amendment's proscription against unreasonable searches and seizures.

The instant case presents the issue in sharp focus. On the one hand are the opinions of the Court of Appeals of Oregon and of the United States District Court for the District of Oregon which upheld as reasonable the warrantless taking of fingernail scraping from respondent, and which applied realistic non-technical, and commonsense standards in so finding. On the other hand is the opinion of the United States Court of Appeals for the Ninth Circuit which held the same search to be unreasonable and which, in a one page, *per curiam* opinion applied technical and legalistic standards of judgment to the same search.

An analysis of the factual situation facing the police in this case and of the three opinions judging the police conduct in the context of that fact situation presents the issue squarely. Detectives of the Portland Police Department had probable cause to believe that respondent Murphy had murdered his wife.[4] the victim had been strangled and detectives investigating the killing had noticed throat lacerations and abrasions on her throat. According to the opinion of the Oregon Court of Appeals at least one of the detectives who was experienced in homicide cases: "knew that throat lacerations were frequently produced by fingernails and that evidence in the form of blood skin and fibers could sometimes be found under the fingernails of assailants in such cases." 465 P. 2d at 904.

4. The Oregon Court of Appeals held: "At the time the police took fingernail scrapings they had probable cause to believe that the defendant was guilty of strangling his wife." 465 P. 2d at 904. This finding was not disturbed by the Ninth Circuit. *Murphy* v. *Cupp*, 461 F. 2d 1006 (9th Cir. 1972).

Murphy, the suspect in the killing, arrived voluntarily at the Portland Police station where he was joined by two attorneys. One of the detectives noticed a dark spot on Murphy's hand which prompted him to think of taking fingernail scrapings from Murphy. Murphy at first refused to permit the taking of the scrapings but the police took the scrapings over the objection of Murphy and his counsel. From the record no force or violence was used. Murphy had not been formally arrested at the time the fingernail scrapings were taken and no warrant was secured prior to their taking. The fingernail scrapings were introduced into evidence against Murphy at his trial for the murder of his wife and he was convicted of second degree murder.

Against this factual background we consider the diametrically opposed approaches which the Oregon Court of Appeals and the Ninth Circuit took in judging whether the warrantless taking of the fingernail scrapings was reasonable. The Ninth Circuit, in finding the search unreasonable, summarily dismissed the contention that exigent circumstances existed which would excuse the failure of the police to procure a search warrant. 461 F. 2d 1006. It is this summary treatment of that issue which, we submit, evidences a legalistic and hypertechnical standard by which the Court measured the police conduct involved, a standard which completely disregards the realities of the situation confronting the police officers.

What were the realities of the situation? Once the detectives had asked Murphy for permission to take fingernail scrapings they were committed, and Murphy was alerted that potentially damaging evidence against him was currently on his person. If, as the jury found, he was, in fact, guilty of strangling his wife; he might well have recalled the fact that he had scratched her, and he was then in a position to fear that traces of her skin or blood were embedded under his fingernails. We use, in common par-

lance, the idiom "at his fingertips" to indicate that something is readily accessible; evidence that could be vital in a murder case was literally "at Murphy's fingertips"—readily accessible to be disposed of.

Now, Murphy undoubtedly knew this, and the detectives, knew that he knew it. Their position, once they had asked Murphy's permission to take fingernail scrapings and alerted him to the existence of this evidence, was such that they either had to take the scrapings at once or risk the loss of this evidence, for Murphy who was not under arrest at the time, could have:

(1) bitten all of his nails off and swallowed them,

(2) cut his nail,

(3) scraped his nails with the nails of his other fingers,

(4) scraped his nails with some object, or

(5) washed his hands and scrubbed his nails, while a search warrant was being secured.

In other words, the loss of the evidence was in fact imminent, and when the situation confronting the police is viewed realistically this threatened loss of possibly vital evidence clearly created an exigency.[5]

The Ninth Circuit simply refused to consider the realities of the situation and imposed, rather, a rigid, technical standard of measurement by which to judge the actions of the police. This attitude is in sharp contradistinction to that of the Oregon Court of Appeals and that of the United States District Court for the District of Oregon. The Oregon Appeals Court summed up the situation facing the officers succinctly and, we emphasize, realistically:

> Unless the defendant were bound, manacled, guarded or by some other means placed in a position where he could not clip his fingernails, scrape the nails of one hand with nails of another, put his fingers in his

5. *See: Schmerber* v. *California*, 384 U. S. 757 (1966).

> mouth or go to the lavatory from the time the police asked him for permission to take fingernail scrapings until the time that they sought and obtained a warrant, *it was entirely likely that the evidence would have been destroyed in the interim.* Proper application of the Fourth Amendment does not require such extremes. The search of the defendant did not violate his constitutional rights to freedom from unreasonable search and seizure.[6] (emphasis added).

The U. S. District Court for the District of Oregon in denying respondents petition for a writ of habeas corpus, applied the same commonsense standard:

> I agree with the reasoning of the unanimous opinion in the Oregon Court of Appeals. The investigating officers had probable cause either to get a search warrant or arrest Murphy. Instead, they merely obtained fingernail scrapings, *which Murphy could have destroyed easily if given the opportunity.*[7] (emphasis added)

This Court, in granting *certiorari* in the instant case has agreed to review the legality of the particular search and seizure involved; however, we submit, that this Court will, in addition, be reviewing the issue of what standards appellate courts should use in judging search and seizure questions: commonsense and realistic or narrow and hypertechnical. We urge the Court, by reversing the judgment of the U. S. Court of Appeals for the Ninth Circuit, to resolve the conflict inherent in the lower courts' opinions in favor of the non-technical, realistic standard.

This Court has long held that in deciding the issue of probable cause to make an arrest or search commonsense standards are to be applied. Thus in *Brinegar* v. *United States,* the Court stated:

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6. 465 P. 2d at 905.

7. Memorandum Opinion: *Murphy* v. *Cupp,* U. S. D. C. Ore., Civil No. 70-883, June 2, 1971.

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and 175 (1948).[8]

In the instant case the issue is not so much one of probable cause, as such, but rather one of the reasonableness of the conduct of police officers, with probable cause, in making a warrantless search—the taking of fingernail scrapings when the destruction or disposal of evidence by the defendant was in all likelihood imminent. We submit, that ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act . . ." standard announced in *Brinegar* (supra) for dealing with the question of probable cause should be the standard set by this Court for lower courts to follow when any aspect of police conduct is under consideration.

This argument in no way suggests that the police be given *carte blanche* in their activities. Police conduct must comport with the limitations set upon it by the law and judicial review of police conduct is an integral part of the law of this country. Our argument addresses itself solely to the *manner* in which such judicial review is to be brought to bear upon police conduct. Policemen, especially in the area of search and seizure, make the myriad decisions upon which to base their actions and such decisions are made in real life, not in ivory towers. We urge herein only that real life standards be used to measure the reasonableness of such decisions.

We believe that the most compelling policy reasons dictate this. That crime is now one of the most pressing domestic problems is, we believe, so obvious as not to require extensive citations of authority. One set of statistics, however, may well make our point. The murder in-

8. See also *United States* v. *Harris*, 403 U. S. 573 (1971); *Adams* v. *Williams*, 407 U. S. 143 (1972).

volved in this case took place in 1967; in that year there were 12,090 homicides in the United States.[9] In the year 1971 there were 17,630 homicides in the United States, an increase of 5,540 killings in five years.[10] We do not argue that any crise rise, no matter how precipitate, would justify the suspension of our constitutional guarantees of civil liberties. We do argue, however, that, in the face of the increase in crime and violence in this country, when the actions of our thinly-stretched peace forces come under judicial scrutiny, that scrutiny be brought to bear in a realistic and commonsense manner.

In summary, then, we urge this Court to hold in the context of the instant case, that a realistic standard of judgment be applied to police activities. This case is a classic example of such a need: the police were investigating a brutal murder and they had ample probable cause to believe that Murphy was involved. Murphy had his rights protected in every way and in fact had counsel present when the search was made. The police were in no way abusive and their action in taking the fingernail scrapings, from everything that the record shows, was prompted by a very commonsense belief that, had they not taken the scrapings when they did, any evidence under Murphy's nails would soon disappear.

The facts of this case are typical of thousands of similar situations which daily confront the police of this nation. Reason and public policy urge that when such situations come before reviewing courts a non-technical, commonsense and realistic standard of judgment be applied. This Court sets the tenor of lower court jurisprudence. In this case we urge that a mandate issue to lower Courts to turn to realistic rather than legalistic methods of judgment of police conduct.

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9. FBI Uniform Crime Reports 1967.

10. FBI Uniform Crime Reports 1971.

II. The Possibility of the Destruction or Disposal of Evidence Creates an Exigency Which Permits a Warrantless Search, and Analogy to Other Decisions of This Court Indicates That the Search in This Case Should Be Upheld.

There is ample legal authority that the possibility of the destruction or disposal of evidence creates an exigency which permits a warrantless search. Mr. Justice Brennan writing for the majority in *Schmerber* v. *California*, 384 U. S. 757, 770 (1966), which upheld the legality of the taking of a blood sample from a drunk driving suspect, stated:

> The officer in the present case, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' *Preston* v. *United States*, 376 U. S. 364, 367.

We submit that the above language is the key to the instant case and that the taking of fingernail scrapings in an attempt to determine whether a suspect had committed murder is no less an emergency than the taking of blood allowed in *Schmerber* to test for the percentage of alcohol in the blood.

This Court, in *Schmerber*, concluded that an officer was not required to obtain a search warrant before a test for blood alcohol content was made and reasoned "that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U. S. at 771.[11] The facts in the case at bar present a situation wherein a suspect could, voluntarily and in a matter of seconds, have destroyed the probable evidence beneath his fingernails if given the opportunity; and, whereas it takes hours for alcohol to be

11. See also *State* v. *Findlay*, 145 N. W. 2d 650 (Iowa 1966).

eliminated from the blood, a process over which the individual has no control, fingernail debris can be eliminated not only speedily, but at will.

Further support for upholding the taking of fingernail scrapings under the circumstances heretofore recited is found by analogy to cases involving fingerprints and palm prints. This Court's decision in *Davis* v. *Mississippi*, 394 U. S. 721 (1968) examined issues similar to those at bar, however the facts are distinguishable.

In *Davis* the police investigating a rape discovered fingerprints on the victim's window sills. Faced with no other lead, the police rounded up some 24 Negro youths, without warrants, and took them to police headquarters for fingerprinting after which they were released. Davis was among those rounded up and his fingerprints matched those at the rape scene. This Court overturned Davis' rape conviction since probable cause was lacking and "Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment." *Davis, supra,* at 727. *Davis* v. *Mississippi*, is clearly distinguishable from the instant case: (1) the instant case did not involve a "dragnet" type of operation (2) the police had probable cause to believe that Murphy had incriminating evidence under his fingernails, and (3) the evidence in the instant case could easily be destroyed.[12]

The majority opinion in *Davis* set forth factors which differentiate fingerprint detentions from the usual arrest and search situation:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's

12. In *Davis*, Mr. Justice Brennan observed that because fingerprints cannot be destroyed, the detention need not come at an inconvenient time and therefore the need for a warrant before detention seemed to lack an exception. 394 U. S. at 727.

> private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the 'third degree.' 394 U. S. at 727.

We submit that the same factors can be used to uphold the legality of taking fingernail scrapings in cases such as this one.

A recent opinion of the Colorado Supreme Court relied upon this Court's decision in *Davis* to allow the warrantless palm printing of a murder suspect. *See, Early* v. *People,* 496 P. 2d 1021 (Colo. 1972).

The warrantless search based on probable cause of a movable vehicle stopped on a highway has been approved by this Court.[13] The rationale for sustaining such searches is that it is not practicable to secure a warrant since the vehicle car be quickly moved out of the locality in which the warrant must be sought. A similar rationale applies to the taking of fingernail scrapings, as the evidence can be quickly removed from under the fingernails. Indeed we believe fingernail scraping under such circumstances presents a stronger case for dispensing with a warrant, because the destruction of evidence in fingernail cases can be so speedily accomplished.

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13. *Chambers* v. *Maroney,* 399 U. S. 42 (1970) and *Carroll* v. *United States,* 267 U. S. 132 (1925).

CONCLUSION.

This is a case involving police conduct which was clearly reasonable under the circumstances when measured by ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* v. *United States, supra.* We submit that this should be the standard by which police search and seizure conduct, particularly when exigent circumstances exist, should be judged.

We therefore urge this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted:

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Respondent believes petitioner's statement of the question presented is inaccurate and inadequate. It should be stated as:

> In what circumstances may the police or prosecutor involved in a case engage in self-help and dispense with the Fourth Amendment's requirement of a neutral and detached magistrate for arrests, searches and seizures?

STATEMENT OF THE CASE

Respondent desires to add the following evidence:

The lacerations and abrasions on the throat of the deceased had been made by something sharp like a fingernail (Tr 21, A 41) (not by a fingernail). The son's fingernails had been bitten back so they were impossible to scrape (Tr 41, A 41). (There was nothing in the evidence as to when this had occurred.)

The respondent's refusal to take a polygraph test (Tr 66, A 64), his refusal to give fingernail scrapings and his refusal to discuss the case further on advice of his attorney, were in the minds of the police not the action of an innocent man (Tr 42, A 46).

The police would have thought of scraping respondent's fingernails without the dark spot (Tr 53, A 53; Tr 62, A 40), since he was a suspect (Tr 40, A 40), and they would have taken scrapings from any suspect (Tr 63, A 61).

Furthermore the police did not know what they would obtain until after the scrapings had been examined (Tr 62, A 60).

ARGUMENT

Searches and seizures conducted outside the judicial process without prior approval by judge or magistrate are unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Coolidge v. New Hampshire*, 403 US 443, 454-455 (1971).

So far, with the exception of automobiles poised for flight, searches and seizures without warrants have been held unlawful despite a showing of probable cause. *Katz v. United States*, 389 US 347, 357 (1967).

The searches and seizures otherwise authorized have been limited to absolute necessity, a search of a person lawfully arrested and his immediate area, primarily for weapons, *Chimel v. California*, 395 US 752, 763 (1969), or in hot pursuit of a fleeing felon, again primarily for weapons, *Warden v. Hayden*, 387 US 294, 298-299 (1967), or where the evidence is in the course of destruction, *Schmerber v. California*, 384 US 757, 770-771 (1966), or the pat-down for weapons by a field-interrogating policeman, *Terry v. Ohio*, 392 US 1, 29-30 (1968).

Of course in this case there was no search incident to a lawful arrest because such must be essentially contemporaneous, *Shipley v. California*, 395 US 818 (1969); *James v. Louisiana*, 382 US 36 (1965), and respondent here was not arrested until a month later (Tr 19, A 21). *Terry v. Ohio*, 392 US 1, 26 (1968).

Petitioner contends there was probable cause to arrest and, therefore, the lesser detention and consequent search and seizure should not be cause for complaint. Outside of a stormy marriage, hardly basis for a charge of murder, and a neat room which could have been arranged either before or after the killing (Tr 35-36, A 35-36), what established this probable cause? Even the police only referred to Murphy as a "suspect" (Tr 40, A 40), *Beck v. Ohio*, 397 US 89 (1964), and he appar-

ently was a suspect because he exercised his Fifth and Sixth Amendment rights which, to the policemen, was not the action of an innocent man (Tr 42, A 46). Surely this cannot be the basis for probable cause! *Griffin v. California*, 380 US 609 (1965).

Because the police may have lawfully occasioned some inconvenience to respondent is not a reason to allow additional unlawful intrusions. *Chimel v. California*, 395 US 752, 763 (1969).

Should Murphy be likened to the automobile "poised for flight"?

First, search of such automobile requires facts showing probable cause that the material sought is present. *Carroll v. United States*, 267 US 132, 162 (1925). Here the police had no idea what the scrapings would show until they had been examined in the laboratory (Tr 62, A 60).

Second, undersigned believes this theory allowing search of an automobile without warrant is obsolete under modern conditions of instant communication for obtaining warrants and stopping automobiles. *cf. Whitely v. Warden*, 401 US 560, 563 (1971).

This is especially so since detentions for various purposes such as obtaining warrants have been authorized. *United States v. Van Leeuwen*, 397 US 249 (1970); *Terry v. Ohio*, 392 US 1 (1968); *Morales v. New York*, 396 US 102 (1969).

Does the fact that the evidence might conceivably have been destroyed create an exception? It has not been

so held, *Vale v. Louisiana*, 399 US 30, 34 (1970), unless the evidence is in the course of destruction. *Schmerber v. California*, 384 US 757, 770-771 (1966). Here the respondent was at the police station under the supervision of police officers (Tr 32-33, A 33; Tr 38-39, A-38-39). *Preston v. United States*, 376 US 364, 368 (1963). Any attempt at spoliation would have been frustrated and the admissibility into evidence of such attempted spoliation would be more damning than the evidence itself. Furthermore, all evidence might conceivably be destroyed. Allowing search and seizure on this basis eliminates the Fourth Amendment altogether.

Petitioner rejects the application of *Davis v. Mississippi*, 394 US 721 (1969) on the basis that it involved a roundup of numerous persons. It does not lessen or increase the invasion of Murphy's rights because others may or may not have also suffered. *cf. United States v. Dionesio*,—US—(January 22, 1973).

Respectfully submitted,

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Counsel for Respondent.

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. One of the most vital of those civil liberties is the right of privacy premised on the Fourth Amendment and reinforced by other Amendments as well. As a result

* Letters of consent to the filing of this brief have been filed with the Clerk. In addition, counsel for the petitioner has orally consented to the late filing of this brief and has been provided with a typed manuscript.

of our concern with this central constitutional safeguard, which nourishes so many of our society's other values, we have participated in many of this Court's cases which have defined the scope of Fourth Amendment protection. Most relevantly, we filed briefs amicus curiae in *Terry* v. *Ohio,* 392 U.S. 1 (1968), *Sibron* v. *New York,* 392 U.S. 40 (1968), and *Adams* v. *Williams,* 407 U.S. 143 (1972).

The purpose of this brief is to suggest to the Court the larger doctrinal context in which the specific issue must be decided. It has been suggested that Fourth Amendment limitations be relaxed in this case to accommodate a "common sense" approach to the reasonableness of police practices. That is why it is vital for this Court to reaffirm the vigor of those safeguards.

ARGUMENT

Introduction

Criminal cases posing Fourth Amendment issues are merely the visible tip of an iceberg of police-citizen encounters. While the immediate issue before the Court in this case is the admissibility of evidence in one criminal trial, the impact of this Court's Fourth Amendment decisions—and the guidelines they embody—are felt with astonishing immediacy by millions of law abiding Americans. Indeed, the sense of privacy and personal dignity which is the hallmark of a free society depends in large part upon the extent to which this Court is successful in resisting the "hydraulic pressures" to skimp on the Fourth Amendment. E.g., *Boyd* v. *United States,* 116 U.S. 616, 635 (1886); *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948).

The broad charter sought by petitioner to conduct warrantless investigative searches, must not be permitted to undercut the "right to be let alone"[1] embodied in the Fourth Amendment.

I.

No probable cause existed to subject respondent to a search.

All concede that, in the absence of probable cause, the police search of the respondent would clearly violate the Fourth Amendment. E.g., *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Vale* v. *Louisiana,* 399 U.S. 30 (1970). While this Court has sanctioned defensive frisks on less than probable cause in the context of street encounters posing a danger to an investigating officer, it has staunchly resisted attempts to dilute the quantum of evidence necessary to justify a search on probable cause within the meaning of the Fourth Amendment. Compare *Terry* v. *Ohio,* 392 U.S. 1 (1968) with *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Aguilar* v. *Texas,* 378 U.S. 108 (1964). Since, at best, the information available to the police when they searched respondent amounted to "articulable suspicion" rather than probable cause, it could not authorize the search to which he was subjected.

In *Terry* v. *Ohio, supra,* and *Adams* v. *Williams,* 407 U.S. 143 (1972), this Court recognized that the suspicious activity of the individuals involved, while justifying a reasonable suspicion, did not satisfy traditional notions of proba-

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[1] *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis).

ble cause. See also, e.g., *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Rios* v. *United States,* 364 U.S. 253 (1960); and *Henry* v. *United States,* 361 U.S. 98 (1959). A comparison of the basis for the search herein with the material available to the police in *Terry, Adams, Rios, Beck* and *Henry,* reveals that, despite the petitioner's protestations to the contrary, the police did not possess probable cause to believe that the respondent was guilty of murder. Apart from respondent's admission that he was separated from his wife and in the vicinity of her home on the night of her murder, the police had no concrete evidence implicating him. Clearly, while additional investigation was warranted, reasonable suspicion had not ripened into probable cause. If the quantum of evidence available to the police at the time they searched the respondent is thought to have constituted probable cause, then the role of a magistrate and the significance of a warrant will be reduced to bureaucratic formalities, since it would be difficult to conceive of a situation in which a warrant would not issue. In effect, the result would be that the quantum of evidence necessary to justify an invasion of a citizen's privacy by the police would be reduced from probable cause to mere hunch or suspicion.

The most telling evidence that no probable cause existed is the unexplained failure of the police to seek a search warrant or to place respondent under arrest.[2] It is hardly to be supposed that Oregon authorities blithely permitted a murder suspect to remain at large for over a month despite their belief that probable cause existed to

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[2] Compare *Chambers* v. *Maroney,* 399 U.S. 42 (1970) and *Vale* v. *Louisiana,* 399 U.S. 30 (1970), where the police officers' contemporaneous actions testified to their belief that probable cause existed.

arrest him. Petitioner's understandable *post hoc* attempt to erect a probable cause justification for the exploratory search must not be permitted to obscure the fact that all parties testified by their contemporaneous behavior that no probable cause existed to conduct the search in question.

II.

The search of respondent was not authorized by a neutral magistrate and was therefore unlawful.

Petitioner argues broadly that police should be permitted to conduct warrantless searches whenever they believe that probable cause exists and that evidence may be destroyed unless an immediate search is undertaken. Since such an "exception" to the Fourth Amendment rule requiring a finding of probable cause by a detached, neutral magistrate prior to a search would, in effect, swallow the rule, it is not surprising that petitioner's contention has been emphatically rejected by this Court. E.g., *Vale* v. *Louisiana, supra.*

In *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), this Court reiterated its repeated holding that a policeman's good faith belief that probable cause exists cannot justify a warrantless search in the absence of narrowly circumscribed "exigent circumstances." As this Court has repeatedly held:

> ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." [3] The exceptions are "jealously

[3] *Coolidge* v. *New Hampshire,* 403 U.S. at 455, quoting from *Katz* v. *United States,* 389 U.S. 347, 357 (1967).

and carefully drawn" [4] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that cause *imperative.*" [5] *Coolidge* v. *New Hampshire,* 403 U.S. at 455 (emphasis added).

Thus, in order to justify the concededly warrantless search of respondent, petitioner must demonstrate that the exigencies of the situation made that course "imperative."

In *Vale* v. *Louisiana, supra,* this Court refused to sanction the warrantless search of a dwelling despite the existence of probable cause, and despite the good faith fears of the police that unless an immediate warrantless search were conducted, evidence might well be destroyed. As this Court noted, the existence of alternative procedures by which the evidence could be safeguarded and a warrant secured removed the case from the "exigent circumstances" exception.

In the instant case, this Court is confronted not with the warrantless search of a dwelling as in *Vale,* nor with the warrantless search of an automobile as in *Chambers* v. *Maroney,* 399 U.S. 42 (1970), but with a warrantless search of the person. While contemporary notions of zones of expected privacy might arguably justify this Court's relaxation of a warrant requirement for probable cause searches of automobiles on the public highway,[6] the core values underlying the Fourth Amendment would be severely imperiled if a similar relaxation were permitted for warrant-

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[4] *Coolidge* v. *New Hampshire, supra,* quoting from *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

[5] *Coolidge* v. *New Hampshire, supra,* quoting from *McDonald* v. *United States,* 335 U.S. 451, 456 (1948).

[6] E.g., *Carroll* v. *United States,* 267 U.S. 132 (1925), *Chambers* v. *Maroney, supra;* see generally, *Katz* v. *United States,* 389 U.S. 347 at 351 (1967).

less searches of the person. The fact that the Court in *Vale* refused to sanction a relaxation of the warrant requirement in the context of searches of dwellings, and in *Coolidge* refused to extend *Chambers* to automobiles not in transit on a public highway, demands strict adherence to warrant requirements when what is at stake is the physical invasion, not merely of a dwelling or an automobile, but of the person itself.

Petitioner seeks to avoid the impact of the Fourth Amendment by arguing that an immediate warrantless search of respondent was "imperative" in order to prevent the destruction of evidence. However, just as the good faith fears of the police officers in *Vale* could not sanction a warrantless search of a residence, so petitioner's fears did not justify the warrantless search of respondent, since a number of alternatives existed whereby the evidence in question could have been safeguarded pending an application for a search warrant.

First, petitioner concedes that one of the elementary police techniques in any strangulation investigation is to check the fingernails of suspects for incriminating evidence. Indeed, in interrogating respondent's son immediately after the discovery of the body, the police visually scanned his fingernails and determined that they were too short to have caused the scratches in question. Thus, the police were aware from the very inception of their investigation that it might become necessary to investigate respondent's fingernails were he to become a suspect. As the record indicates, despite the fact that by 4 P.M. the police were in possession of every piece of evidence which they now contend constituted probable cause to search respondent, they failed to seek judicial authorization for their search

during the 5-6 hours that elapsed between respondent's emergence, in police eyes, as a prime suspect at 4 P.M., and the actual search, which occurred between 9-10 P.M.[7] The existence of this classic alternative to the exploratory, warrantless search at issue herein, clearly removes this case from the exigent circumstances doctrine.

But even if one assumes—contrary to the record—that the police officers' perception of respondent as a prime suspect did not ripen until immediately prior to the search (thus rendering it difficult to obtain prior judicial sanction for the search), the police, assuming they had probable cause, should nevertheless have been required to arrest respondent and could then have subjected him to an appropriately narrow search incident to his arrest. *Chimel* v. *California*, 395 U.S. 752 (1969). Instead, petitioner urges that the "lesser intrusion" of a search is preferable to an arrest, and that, therefore, the warrantless seizure of the evidence was proper. However, by permitting warrantless "lesser intrusions" instead of an arrest, this Court would be encouraging police-citizen contacts on less than probable cause. For, while experience teaches us that arrests—with the substantial collateral formalities involved—are rarely indulged in without a good faith belief that probable cause exists, "lesser intrusions"—with their inherent low visibility—are epidemically initiated on mere hunch or suspicion. Thus, the requirement that a police officer bear witness to his belief that probable cause exists by initiating the formal process of arrest, operates as a

[7] Respondent suggests that this unexplained failure to seek judicial sanction for a search which petitioner insists was based upon probable cause stems not from a desire on the part of the police to avoid the warrant process, nor from incompetence, but from the contemporaneous realization by all concerned that no probable cause existed to conduct a search of respondent at that time.

critical self-executing check upon the practice of warrantless exploratory searches, the ultimate validity of which will always be subject to the vagaries of "hindsight judgment." *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964). Indeed, the conduct of the police in this case in failing to arrest respondent demonstrates that, when probable cause is doubtful, police are far more reluctant to initiate an arrest than to engage in an exploratory search in the guise of a "lesser intrusion."

CONCLUSION

The failure of the police to utilize either a warrant or a search incident to an arrest in this case is, of course, closely connected to the absence of probable cause. In fact, petitioner's plea of exigent circumstances flows not from the "imperative" need for a warrantless search but from the lack of any basis upon which a warrant could have been secured. Petitioner's complaint, therefore, is not directed to the requirement of prior neutral scrutiny but rather to the principle that, in our society, exploratory searches are simply not permitted on the basis of good faith police suspicion which does not rise to the level of probable cause.

Respectfully submitted,

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March, 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CUPP, PENITENTIARY SUPERINTENDENT *v.* MURPHY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-212. Argued March 20, 1973—Decided May 29, 1973

Over respondent's protest and without a warrant, police in the course of station house questioning in connection with a murder took samples from the respondent's fingernails and discovered evidence used to convict him. Respondent had come to the station house voluntarily and had not been arrested, although he was detained and there was probable cause to believe that he had committed the murder. In reversing the District Court's denial of habeas corpus, the Court of Appeals concluded that, absent arrest or other exigent circumstances, the search was unconstitutional. *Held:* In view of the station house detention upon probable cause, the very limited intrusion undertaken to preserve highly evanescent evidence was not violative of the Fourth and Fourteenth Amendments. Pp. 3–6.

461 F. 2d 1006, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring statement. MARSHALL, J., filed a concurring opinion. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined. DOUGLAS and BRENNAN, JJ., filed opinions dissenting in part.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

The respondent appealed his conviction, claiming that the fingernail scrapings were the product of an unconstitutional search under the Fourth and Fourteenth Amendments. The Oregon Court of Appeals affirmed the conviction, 2 Ore. App. 251, 465 P. 2d 900, and we denied certiorari, 400 U. S. 944. Murphy then commenced the present action for federal habeas corpus relief. The District Court, in an unreported decision, denied the habeas petition, and the Court of Appeals for the Ninth Circuit reversed, 461 F. 2d 1006. The Court of Appeals assumed the presence of probable cause to search or arrest, but held that in the absence of an arrest or other exigent circumstances, the search was unconstitutional. *Id.*, at 1007. We granted the State's petition for certiorari, 409 U. S. 1036, to consider the constitutional question presented.

The trial court, the Oregon Court of Appeals, and the Federal District Court all agreed that the police had probable cause to arrest the respondent at the time they detained him and scraped his fingernails. As the Oregon Court of Appeals said,

> "At the time the detectives took these scrapings they knew:
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> "The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.
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> "The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.
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> "The defendant and his deceased wife had had a stormy marriage and did not get along well.
>
> "The defendant had, in fact, been at his home on the night of the murder. He left and drove back to

> central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate." 2 Ore. App., at 259–260, 465 P. 2d, at 904.

The Court of Appeals for the Ninth Circuit did not disagree with the conclusion that the police had probable cause to make an arrest, 461 F. 2d, at 1007, nor do we.

It is also undisputed that the police did not obtain an arrest warrant nor formally "arrest" the respondent, as that term is understood under Oregon law.[1] The respondent was detained only long enough to take the fingernail scrapings, and was not formally "arrested" until approximately one month later. Nevertheless, the detention of the respondent against his will constituted a seizure of his person, and the Fourth Amendment guarantee of freedom from "unreasonable searches and seizures" is clearly implicated, cf. *United States* v. *Dionisio*, — U. S. —, *Terry* v. *Ohio*, 392 U. S. 1, 19. As the Court said in *Davis* v. *Mississippi*, 394 U. S. 721, 726–727, "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "

In *Davis*, the Court held that fingerprints obtained during the brief detention of persons seized in a police dragnet procedure, without probable cause, were inadmissible in evidence. Though the Court recognized that fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," 394 U. S., at 727, the Court

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[1] Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210.

held the station house detention in that case to be violative of the Fourth and Fourteenth Amendments. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," *Id.*, at 726.

The respondent in this case, like Davis, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us. Cf. *United States* v. *Dionisio*, — U. S. —.

The inquiry does not end here, however, because Murphy was subjected to a search as well as a seizure of his person. Unlike the fingerprinting in *Davis*, the voice exemplar obtained in *United States* v. *Dionisio, supra*, or the handwriting exemplar obtained in *United States* v. *Mara*, — U. S. —, the search of the respondent's fingernails went beyond mere "physical characteristics . . . constantly exposed to the public," *United States* v. *Dionisio, supra*, and constituted the type of "severe though brief intrusion upon cherished personal security" that is subject to constitutional scrutiny. *Terry* v. *Ohio, supra*, at 24–25.

We believe this search was constitutionally permissible under the principles of *Chimel* v. *California*, 395 U. S. 752. *Chimel* stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest. *Id.*, at 755–762. The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession. *Id.*, at 762–763. The Court recognized in *Chimel* that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant re-

quirement.[2] Thus a warrantless search incident to arrest, the Court held in *Chimel,* must be limited to the area "into which an arrestee might reach." 395 U. S., at 763.

Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself. Accordingly, we do not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant. But the respondent was not subjected to such a search.

At the time Murphy was being detained at the station house, he was obviously aware of the detectives' suspicions. Though he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention. Testimony at trial indicated that after he refused to consent to the taking of fingernail samples, he put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a "metallic sound, such as keys or change rattling" was heard. The rationale of *Chimel,* in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails, cf. *Schmerber* v. *California,* 384 U. S. 757.

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[2] As the Court stated in *Terry* v. *Ohio,* "our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U. S., at 19–20.

On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannnot say that this search violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE joins the opinion of the Court but does not consider the issue of probable cause to have been decided here or to be foreclosed on remand to the Court of Appeals where it has never been considered.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE MARSHALL, concurring.

I join the opinion of my BROTHER STEWART.

Murphy's freedom of movement was unquestionably limited when the police did not acquiesce in his refusal to permit them to take scrapings from his fingernails. But that detention, although a seizure of the person protected by the Fourth Amendment, did not amount to an arrest under Oregon law. See Ore. Rev. Stat. § 133.210. The police, understanding this, did not, for example, take Murphy promptly before a magistrate after this detention, as state law requires after an arrest. Ore. Rev. Stat. § 133.550.[1] As we have said before, however, "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968). See also *id.*, at 19 n. 16, 26; *Sibron* v. *New York*, 392 U. S. 40, 67 (1968).

[1] Thus this case does not require us to determine whether the police were required to obtain a warrant for Murphy's arrest at the relevant time. Cf. *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 477–481 (1971).

Murphy argues, however, that the detention was unlawful because the police did not satisfy "the general requirement that the authorization of a judicial officer be obtained in advance of detention," *Davis* v. *Mississippi*, 394 U. S. 721, 728 (1969). See also *Terry* v. *Ohio*, *supra*, at 20. But until the officer saw a dark spot under Murphy's thumbnail, and remembered that he had seen lacerations on the throat of the deceased, he had no reasons to detain Murphy for the limited purpose of taking fingernail scrapings. Then, when he brought to Murphy's attention his interest in taking such scrapings, he was dealing with a suspect alerted to the desire of the police to inspect his fingernails. At that point, there was no way to preserve the status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so. The police could not assure that the evidence was preserved simply by placing Murphy under close surveillance, because of the nature of the evidence. And, for purposes of Fourth Amendment analysis, detaining him while a warrant was sought would have been as much a seizure as detaining him while his fingernails were scraped. If the Fourth Amendment permits a stop-and-frisk when the police have specific articulable facts from which they may infer that a person, whom they suspect is about to commit a crime, is armed and dangerous, *Terry* v. *Ohio*, *supra*, it also permits detention, where the police have probable cause to arrest,[2] to take fingernail scrapings in the circumstances of this case.[3]

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[2] The Court of Appeals assumed that there was probable cause to arrest, and I proceed on that assumption. I agree with MR. JUSTICE WHITE that the question of probable cause to arrest is open on remand.

[3] MR. JUSTICE DOUGLAS suggests that the taking of fingernail scrapings might violate the Fifth Amendment privilege against self-

Murphy's argument is, of course, a troublesome one, and, if the police had done more than take fingernail scrapings, I would be inclined to hold the search illegal. For, as a general principle of the law of the Fourth Amendment, the scope of a search must be strictly limited in terms of the circumstances that justify the search. See, *e. g.*, *Terry* v. *Ohio*, *supra*, at 19–20; *Chimel* v. *California*, 395 U. S. 752 (1969). When a person is detained, but not arrested, the detention must be justified by particularized police interests other than a desire to initiate a criminal proceeding against the person they detain. The police therefore cannot do more than investigate the circumstances that occasion the detention. In this case, the police limited their intrusion to precisely the area that led them to restrict Murphy's freedom; he was not searched as extensively as he might have been had an arrest occurred. Indeed, in my view, the Fourth Amendment would have barred a more extensive search, for the police had no reason at all to believe that Murphy had on his person more evidence relating to the crime, or, in light of the fact that this case involved a strangulation, a weapon that he might use at the stationhouse.

I realize that exceptions to the warrant requirement may be established because of "powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees," *Terry* v. *Ohio*, *supra*, at 39 (opinion of DOUGLAS, J.), and that those same pressures may lead to later expansion of the exceptions beyond the narrow confines of the cases in which they are established, *Adams* v. *Williams*, 407 U. S. 143, 161–162 (opinion of Marshall, J.). But I cannot say that, in the

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incrimination. In my view, however, that privilege is confined to situations in which the evidence could be secured by the State only with the defendant's "affirmative cooperation," *United States* v. *Dionisio*, 409 U. S. —, — (1973).

precise circumstances of this case, the police violated the Fourth Amendment in detaining Murphy for the limited purpose of scraping his fingernails. I emphasize, as does the opinion of the Court, that the search conducted incident to this detention was extremely narrow in scope, and that its scope was tied closely to the reasons justifying the detention. On this understanding, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

The Court today permits a search for evidence without an arrest but under circumstances where probable cause for an arrest existed, where the officers had reasonable cause to believe that the evidence was on respondent's person, and where that evidence was highly destructible. The Court, however, restricts the permissible quest to "the very limited search necessary to preserve the highly evanescent evidence they found under [respondent's] fingernails."

While I join the Court's opinion, I do so with the understanding that what the Court says here applies only where no arrest has been made. Far different factors, in my view, govern the permissible scope of a search incident to a lawful arrest.

SUPREME COURT OF THE UNITED STATES

No. 72–212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

In this case the District Court and the Court of Appeals entertained a habeas corpus attack upon a state court conviction on the ground that the evidence seized in violation of the Fourth Amendment had been wrongly admitted at the state trial. For the reasons set forth in my concurring opinion in *Schneckloth* v. *Bustamonte*, p. —, *ante*, I think a claim such as this is properly available in federal habeas corpus only to the extent of ascertaining whether the petitioner was afforded a fair opportunity to raise and have adjudicated the question in state courts. The Court today, however, reaches the merits of the respondent's Fourth Amendment claim, and on the merits I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by *Chimel* v. *California*, 395 U. S. 752, on which the Court relies, for in *Chimel* an arrest had been made.

As the Court states, Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210. No such arrest was made until a month after Murphy's fingernails were scraped. As we stated in *Johnson* v. *United States*, 333 U. S. 10, 15 n. 5, "State law determines the validity of arrests without warrant." The case is therefore on

all fours with *Davis* v. *Mississippi*, 394 U. S. 721, where a suspect was detained for the sole purpose of obtaining fingerprints but at the time the police were not detaining him to charge him with the crime. Like the seizure in this case, *Davis* involved an investigative seizure. In *Davis*, *id.*, at 727, as in *Terry* v. *Ohio*, 392 U. S. 1, 19, the Court rejected the view that the Fourth Amendment does not limit police conduct "if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"

The reasons why no arrest of Murphy was made on the day his fingernails were scraped creates a nagging doubt that they did not then have probable cause to make an arrest and did not reach that conclusion until a month later. Why was Murphy allowed to roam at will, a free man, for the next month? The evolving pattern of a conspiracy offense might induce the police to turn a suspect loose in order to tail him and see what other suspects could be brought into their net. But no such circumstances were present here.

What the decision made today comes down to, I fear, is that "suspicion" is the basis for a search of the person without a warrant. Yet "probable cause" is the requirement of the Fourth Amendment which is applicable to the States by reason of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643. Suspicion has never been sufficient for a warrantless search, save for the narrow situation of searches incident to an arrest as was involved in *Chimel*. That exception is designed (see *Schmerber* v. *California*, 384 U. S. 757, 769–770) to protect the officer against assaults through weapons within easy reach of the accused or to save evidence within that narrow zone from destruction. But this is a case where a warrant might have been sought but was not. It is therefore governed by the rule that the rights of a person "against unlawful search and seizure are to be

protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. No warrant could have been issued by the police, for as we held in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 453, a warrant must be issued by "the neutral and detached magistrate required by the Constitution." And see *Mancusi* v. *DeForte*, 392 U. S. 364, 371. As stated in *Johnson* v. *United States*, *supra*, at 14, "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." In that case the officers, smelling opium, asked for entrance which was given. On entry, discovering that the accused was the sole occupant, the police arrested her. "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." *Id.*, at 16–17.

It will not do here either. As *Boyd* v. *United States*, 116 U. S. 616, stated, the Fourth Amendment is closely related to the Self Incrimination Clause of the Fifth.* A warrantless search on suspicion, today sustained, gives the police evidence otherwise protected by the Self Incrimination Clause of the Fifth Amendment. It was in that regard that the Court in *Boyd* said ". . . the Fourth and Fifth Amendments run almost into each other." *Id.*, at 630. And that Court went on to say: "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against

*My Brother MARSHALL says that this privilege is confined to cases where the evidence can be obtained only with the defendant's cooperation. But that extends even to boundaries set by *Schneider* case, involving forced giving of blood. 364 U. S. 757, 761, which my Brother MARSHALL disagrees. *United States* v. *Dionisio*, 410 U. S. —.

himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." *Id.*, at 633.

The same can be said of incriminating evidence found under a suspect's fingernails. See *Rochin* v. *California*, 342 U. S. 165. Moreover, the Fourth Amendment guarantees the right of the people to be secure "in their persons." Scraping a man's fingernails is an invasion of that privacy and it is tolerable, constitutionally speaking, only if there is a warrant for a search or seizure issued by a magistrate on a showing of "probable cause" that the suspect had committed the crime. There was time to get a warrant; Murphy could have been detained while one was sought; and that detention would have preserved the perishable evidence the police sought. A suspect on the loose could get rid of it; but a suspect closely detained until a warrant is obtained plainly could not.

Our approval of the short-cut taken to avoid the Fourth and Fifth Amendments may be typical of this age. Erosions of constitutional guarantees usually start slowly, not in dramatic onsets. As stated in *Boyd* "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 116 U. S., at 635.

The issue of probable cause should be considered by the Court of Appeals. On the record before us and the arguments based on it I cannot say there was "probable

cause" for an arrest and for a search, since the arrest came only a month later. The only weight we can put in the scales to turn suspicion into probable cause is Murphy's conviction by a jury based on the illegally obtained evidence. That is but a simple way of making the end justify the means—a principle wholly at war with our constitutionally enshrined adversary system.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, *v.* Daniel P. Murphy.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 29, 1973]

MR. JUSTICE BRENNAN, dissenting in part.

Without effecting an arrest, and without first seeking to obtain a search warrant from a magistrate, the police decided to scrape respondent's fingernails for potentially destructible evidence. In upholding this search, the Court engrafts another, albeit limited, exception on the warrant requirement. Before we take the serious step of legitimating even limited searches merely upon probable cause—without a warrant or as incident to an arrest—we ought first be certain that such probable cause in fact existed. Here, as my Brother DOUGLAS convincingly demonstrates "[w]hether there was or was not probable cause is difficult to determine on this record." *Ante,* at —. And, since the Court of Appeals did not consider that question, the proper course would be to remand to that court so that it might decide in the first instance whether there was probable cause to arrest or search. There is simply no need for this Court to decide, upon a disputed record and at this stage of the litigation, whether the instant search would be permissible if probable cause existed.